85-930

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1985

No. .....

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street
New York, New York 10036
(212) 730-0044
Attorneys for Petitioners

Of Counsel:
John W. Whittlesey

PRINTINGHOUSE PRESS – (212) 719-3120

QUESTIONS PRESENTED FOR REVIEW

(1) When a licensed deck officer accepts competitive employment on ocean-going vessels under a different union's contract to extricate himself from a "Hobson's choice" of low paying and degrading assignments that his former union and employers deliberately created, to force him and others similarly situated to retire in the interest of obtaining "new young blood", should the pension plan that they jointly sponsor be required to pay him the full economic value of the pension benefit he would have received without regard to such other employment?

(2) Should summary judgment dismissing the antitrust cause of action have been denied?

(3) When the denial, reduction and suspension of benefits under a multi-employer pension plan have been found to be a "harsh penalty" that is both discriminatory and "arbitrary and capricious", and the District Court's findings establish that the participant's change in employment was the outgrowth of what was tantamount to an involuntary constructive discharge, is the conditioning of the remedy afforded upon his permanent withdrawal from competitive employment inequitable, or in contravention of the policy undergirding the Age Discrimination in Employment Act as well as the antitrust laws and ERISA, and should payment of the full economic value of the pension benefit to which he would have been entitled in the absence of such other employment, together with interest, be required?

(4) When the deletion of an age 65 requirement as a pre-condition for pension benefits is part of the bargaining history of the labor agreement, is the reintroduction of such a requirement by pension plan trustees, without such a change having been made in the labor agreement itself, void and *ultra vires* as being both an alteration of vested rights and contrary to the requirement that pension plan trustees as fiduciaries must discharge their duties for the exclusive purpose of providing benefits to participants in accordance with the documents and instruments governing the plan?

LIST OF PARTIES TO PROCEEDING BELOW

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Plaintiffs-Appellees, Cross-Appellants,

-v-

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C. SCOTT, CAPT. JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEN SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WHITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pensions Plan,

Defendants-Appellants, Cross-Appellees,

AMERADA HESS CORPORATION, AMOCO SHIPPING COMPANY, CENTRAL GULF LINES, INC., AMERICAN MARITIME ASSOCIATION, NATIONAL TRANSPORT CORP., WABASH TRANSPORT, INC., MARITIME SERVICES COMMITTEE, INC., INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Defendants, Cross-Appellees.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Parties to the Proceedings Below	ii
Table of Contents for Appendix	iv
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Petition	6
I. THE TRUE ECONOMIC VALUE OF THE SAME MONTHLY BENEFIT NOT PAYABLE UNTIL EIGHT YEARS LATER IS SUBSTANTIALLY REDUCED	6
II. WHETHER ERISA ELIMINATED ANTITRUST REMEDIES WARRANTS REVIEW	10
III. EQUITABLE REMEDIES UNDER ERISA SHOULD PROVIDE A FULL REMEDY FOR THE INJURY, AND NOT ONE THAT IS CONTRARY TO OTHER STATUTORY PURPOSES	15
IV. REVIEW SHOULD BE GRANTED TO AVOID RELIANCE UPON ERISA TO PERMIT THE IMPAIRMENT OF EXISTING CONTRACT RIGHTS	18
Conclusion	21

TABLE OF CONTENTS FOR APPENDIX

(under separate cover)

PAGE

Decision of the United States Court of Appeals for the Second Circuit A-1

Decision of the United States District Court for the Southern District of New York filed August 8, 1984 ..... B-1

Judgment of the United States District Court for the Southern District of New York dated October 29, 1984 ..... B-14

Endorsement Order of the United States District Court for the Southern District of New York dated November 30, 1984 ..... C-1

Decision of the United States District Court for the Southern District of New York on Defendants' Summary Judgment Motion dated September 14, 1983 ..... D-1

Trial Testimony of Dr. Ralph Garfield, Expert Witness on Behalf of the Plaintiffs E-1

Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 59(e) dated November 8, 1984 ..... E-7

Affidavit of Dr. Ralph Garfield in Support of Plaintiffs' Rule 59(e) Motion E-9

Statutory Provisions Relied Upon F-1

Opinion of District Court in *Deak v. Masters, Mates and Pilots Pension Plan, et al.*, Middle District of Florida, Tampa Division G-1

Excerpts from Plaintiffs' Responses to Interrogatories dated March 22, 1982, Relating to Antitrust Damages H-1

Clipping entitled "End Age Rule on Vested Pensions" from *The Master, Mate & Pilot*, "The Official Voice of International Organization of Masters, Mates and Pilots," dated November, 1961 ..... H-3

Excerpts from Trial Testimony of Robert J. Lowen, President of the M.M.&P. I-1

TABLE OF AUTHORITIES

Cases PAGE

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 20

Anderson v. Shipowners Ass'n of the West Coast, 272 U.S. 359 (1926) 11

Between International Longshoremen's Association and National Marine Engineers Beneficial Association, Determination re S/S MOUNT EXPLORER, Case No. 75108 (April 21, 1976) 12

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 14

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 799 (1977) 13

Chambless v. Masters, Mates & Pilots Pension Plan, et al., 772 F.2d 1032 (2d Cir. 1985) 2

Chambless v. Masters, Mates & Pilots Pension Plan, et al., 602 F. Supp. 904 (S.D.N.Y. 1984) 2

Chambless v. Masters, Mates & Pilots Pension Plan, et al., 571 F. Supp. 1430 (S.D.N.Y. 1983) 2

Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793 (2d Cir. 1977) 12

Deak v. Masters, Mates and Pilots Pension Plan, No. 79-190 (M.D. Fla. June 4, 1984) 5, 6, 9, 14

Duchow v. New York State Teamsters Conference Pension and Retirement Fund, 691 F.2d 74 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983) 11, 21

Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984) 17

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 12

International Organization of Masters, Mates & Pilots v. NLRB, 575 F.2d 896 (D.C. Cir. 1978) 12

Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) 12

Kross v. Western Electric Co., Inc., 534 F. Supp. 251 (N.D. Ill. 1982), 701 F.2d 1283 (7th Cir. 1983) 17

Lojek v. Thomas, 716 F.2d 675 (9th Cir. 1983) 10, 15, 17

Massachusetts Mutual Life Insurance Company v. Russell, ____ U.S. ____, 53 U.S.L.W. 4938 (1985) 14

Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan, 1 E.B.C. (BNA) 1868 (D.D.C. 1979) 19

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 14

Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. Feb. 20, 1985) 13

Poller v. CBS, 368 U.S. 464 (1962) 11

Post v. Merrill Lynch, 48 N.Y.2d 84 (1979) 9, 16

Radovich v. National Football League, 352 U.S. 445 (1957) 13

Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976) 13

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 12

UMW v. Robinson, 455 U.S. 562 (1982) 20

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 12

Ursic v. Bethlehem Mines, 556 F. Supp. 571 (D.C. Pa. 1983) *aff'd* 719 F.2d 690 (3d Cir. 1983) 17

Whittlesey v. Union Carbide Corp., 742 F.2d 725 (2d Cir. 1984) 15

Statutes

Age Discrimination in Employment Act
29 U.S.C. § 621, *et seq.* 15

Clayton Antitrust Act
15 U.S.C. § 15 2

Employment Retirement Income Security Act of 1974 ("ERISA")
29 U.S.C. § 1002(22) 2, 19
29 U.S.C. § 1002(24) 2, 19
29 U.S.C. § 1053(a) 2
29 U.S.C. § 1104(a) 2
29 U.S.C. § 1105 2
29 U.S.C. § 1132(a) 2, 14, 16
29 U.S.C. § 1132(f) 2
29 U.S.C. § 1140 ..... 2, 10, 14, 17
Labor-Management Relations Act of 1947
29 U.S.C. § 185(a) 2, 20
Sherman Antitrust Act
15 U.S.C. § 1 2

Other Authorities

Federal Rule of Civil Procedure
59(e) 4
Niles, "A Contemporary View of Liability for Breach of Trust," 29 *Record of the Association of the Bar of the City of New York* 573 (1974) (Hess Memorial Lecture) 7
Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 Minn. L. Rev. 1011 (1983) 11
Note, *Antitrust Standing of Terminated Employees*, 25 Wm. & Mary L. Rev. 341 (1983) 11
Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 Mich. L. Rev. 1846 (1983) 11, 13
2 PRENTICE–HALL, PENSION AND PROFIT-SHARING ¶ 90,334 at p. 90,763 20
Treas. Regs. § 1.411(b) 19

In the

Supreme Court of the United States

October Term, 1985

No. .....

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Arthur Chambless and Mildred H. Chambless petition for a writ of certiorari to review a judgment of the above-entitled case by the United States Court of Appeals for the Second Circuit entered on August 28, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Chambless v. Masters, Mates & Pilots Pension Plan, et al.*, 772 F.2d 1032 (2d Cir. 1985), and is set forth in the Appendix at pages with the prefix "A." The decision of the United States District Court for the Southern District of New York is reported at 602 F. Supp. 904 (S.D.N.Y. 1984), and is set forth in the Appendix at pages with the prefix "B." An unreported Endorsement Order of the United States District Court of the Southern District of New York dated November 30, 1984 is set forth in the Appendix at pages with the prefix "C." An earlier decision of the United States District Court for the Southern District of New York granting in part defendants' motion for summary judgment is reported at 571 F. Supp. 1430 (S.D.N.Y. 1983), and is set forth in the Appendix at pages with the prefix "D."

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1985 (A-1). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1002(22), 1002(24), 1053(a), 1104(a), 1105, 1132(a) & (f), 1140, the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a), the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 15. The foregoing provisions are set forth in the Appendix at pages with the prefix "F."

STATEMENT OF THE CASE

This case involves Captain Arthur Chambless who has spent his life at sea in the United States Merchant Marine, working his way up from seaman to "Master" or Captain, the highest officer in command of huge, sea-going tanker vessels, and his wife, Mildred H. Chambless. The basis for federal jurisdiction in the court of first instance is ERISA (29 U.S.C. § § 1132(a) and 1140), the Clayton Antitrust Act (15 U.S.C. § 15), and the Labor-Management Relations Act of 1947 (29 U.S.C. § 185(a)).

Captain Chambless sailed for over 33 years as a member of the International Organization of Masters, Mates & Pilots (the "union" or "M.M.&P."). On April 2, 1977, he filed an application for retirement benefits with the M.M.&P. Pension Plan (A-6).* The pension plan is an M.M.&P.-sponsored multi-employer plan covering a portion of the employers sailing U.S. flag ships in ocean-going commerce. It provides for specified benefits which the employers are required to finance under the collective bargaining agreement by making annual contributions in amounts determined by the pension plan's actuary.

On June 30, 1977, the pension plan informed Captain Chambless that his benefit under the pension application that he had filed would be $920 per month, payable beginning as of May 1, 1977 (A-6).

Later, when Captain Chambless informed the pension plan that he had been sailing in competitive employment under another labor contract, in reliance upon advice given him by a union agent, he was told that his pension benefit would be suspended for ten years, until he reached age 65 (even if he stopped sailing immediately), and then reduced to a monthly benefit of only $470 per month (A-6-7).

The District Court held that the suspension and reduction in benefits were both discriminatory and "arbitrary and capricious."

The findings of the District Court that set forth the underlying punitive motive for the action by the pension plan are as follows (B-10-12):

> "In 1976, the union launched a plan to pressure older licensed deck officers to retire. Chambless, who between 1966 and 1975 had regularly received assignments as chief mate or master, was told either to retire or to accept only the lowest grade assignment – second or third mate. Indeed, his only assignments from MM&P hiring halls during 1976 and 1979 were second and third mate jobs.
>
> * * * *
>
> "The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P in jobs matching the skills and experience they have acquired. This is another reason why the penalty imposed on Chambless for accep-

---

* Citations with letter prefixes are to pages in the Appendix.

ting employment as a master on ships operated by companies not under contract to MM&P is capricious.

"A retiree who works in forbidden employment but not as a licensed deck officer on a U.S. flag ocean going vessel operated by a company not under contract to MM&P forfeits his pension for the time he is working and for six months thereafter. One, however, who works as a licensed deck officer on a U.S. vessel under the jurisdiction of a rival union forfeits his pension until age 65. This regulation does not conform to ERISA requirements.

* * * * *

"The union wanted to keep younger licensed deck officers content with their MM&P affiliation. Therefore they pressured the older officers to retire with these provisions. Given the wage related formula for computing pension benefits, the threat to assign older officers lower paying second and third mate jobs was tantamount to a threat to reduce their pensions. Thus they had to choose between retiring and securing a greater pension benefit or continuing to work faced with both a loss of pay and status and also a reduced pension. *Amendment 47 was intended to prevent older officers from escaping this Hobson's choice by taking non-MM&P jobs.*

"While the trustees may clearly impose regulations requiring full retirement before they are obligated to award pension benefits, *they cannot extract the harsh penalty they imposed on Chambless in this case*. The regulation pursuant to which the penalty was imposed is not in the interest of the plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund. Accordingly, the action of the trustees was arbitrary and capricious." (Emphasis added.)

However, the District Court did not fix the precise amount of damages. In response to plaintiffs' Fed.R.Civ.P. 59(e) motion, the District Court declined to do so, stating (C-1-2):

"Under the court's judgment, Captain Chambless is entitled to receive in 1985 the wage related benefits he would have been entitled to receive in 1977. If 1977 pensioners similarly situated to Captain Chambless have received cost of living increments which increase their monthly benefits beyond the 1977 level, it may well be that Captain Chambless might be entitled to a monthly stipend with

cost of living increments to bring him on par with other 1977 pensioners. It will be time enough to study that issue, if necessary, on remand. *My opinion did not contemplate pension benefits for Captain Chambless retroactive to 1977. Mr. Garfield's approach was not considered.* If this matter is appealed, plaintiff would be advised to raise those questions on appeal. Indeed, it would probably be prudent on plaintiff's part to cross-appeal, since a notice of appeal has been filed by defendant, in order to be certain that this matter is considered by the Court of Appeals. The issue of the cost of living increments does not appear to the court to necessitate a cross-appeal, but, again, prudence would dictate that the matter be presented to the court in brief and argument upon appeal." (Emphasis added.)

On appeal by the pension plan, the Court of Appeals affirmed the determination that the application of the pension plan regulation in question to Captain Chambless was arbitrary and capricious and therefore a "nullity" (A-15). However, the Court of Appeals also affirmed the decision of the District Court on the cross-appeal on behalf of plaintiffs wherein it was contended *inter alia* that the pension benefit to Captain Chambless should be adjusted to reflect the differing values of a benefit beginning in 1977, as opposed to eight or more years thereafter, or granted retroactively, and dismissing the antitrust claim.

A class action against the same pension plan pending in the United States District Court for the Middle District of Florida, Tampa Division, involves a companion amendment to the pension plan (Amendment 46) adopted in August 1976, when the amendment here involved (Amendment 47) was adopted. *Deak v. Masters, Mates and Pilots Pension Plan, No. 79-190* (M.D. Fla. June 4, 1984). Captain Chambless was permitted by court order to withdraw from the class represented in the *Deak* case because of the differing issues involved, including the antitrust count in this action.

The District Court's decision in the *Deak* case is set forth in the Appendix at pages with the prefix "G." In that case, the District Court found the pension plan's trustees to have breached their fiduciary duties. (G-11) This was based upon a finding that the trustees had penalized pensioners in order to discourage them from seeking employment elsewhere in the industry in a job which benefited a competing union. (G-11) However, the benefit suspension invalidated in *Deak* was less

harsh than the punitive action taken against Captain Chambless because it did not also involve a drastic reduction in the amount of the monthly benefit. The *Deak* case remains pending in the District Court in Florida.

I. THE TRUE ECONOMIC VALUE OF THE SAME MONTHLY BENEFIT NOT PAYABLE UNTIL EIGHT YEARS LATER IS SUBSTANTIALLY REDUCED.

Captain Arthur Chambless is in the paradoxical situation of having won his case of abusive behavior on the part of a pension plan, only to find that the judgment he won apparently will yield a pension having true economic value that is substantially less than that which he originally would have received, had he bowed to defendants' unlawful dictates. This is a result of the refusal of the courts below to recognize the true economic value of the monthly benefit at the time it is payable.

The life expectancy of Captain Chambless when the pension commences will be eight years less then it was in 1977. Therefore, a pension in the amount of $920 per month for life beginning now does not have the same economic value as a monthly benefit of the same amount beginning in 1977.

At the trial of the case, an expert witness, Dr. Ralph Garfield, testified that the difference in value of the $920 per month pension that Captain Chambless indisputably could have received as of May 1, 1977, and the $470 per month pension benefit that the pension plan proposed to pay him more than eight years later (and then, only if he survived), was $151,820 ($196,122 - $44,302). (E-6-7) No contrary evidence was offered on behalf of the pension plan.

The District Court concluded that the action of the pension plan trustees was a nullity because it "confiscated a considerable part" of the pension benefit of Captain Chambless. (B-9) Yet, under the District Court's judgment, that confiscation, although reduced in amount, still continues.

The plan should either have been required to provide retroactive benefits to Captain Chambless or to enhance the value of the benefit to correspond to what it would have been in 1977. It did neither.

The net result is that, notwithstanding execrable behavior found to be discriminatory as well as arbitrary and capricious, the defendants are allowed to retain a very real financial advantage. Dr. Garfield tes-

tified that $112,607 represented the value (with interest) of what the pension plan otherwise would have had to pay out to Captain Chambless in the intervening period while his rights were being litigated. (E-7) If that amount is not paid over to Captain Chambless, it will reduce by like amount the contributions that the employers otherwise will be required to make to the pension plan. Simple equity requires that funds retained by a pension plan while a participant's rights are being successfully litigated should be paid to the participant in order to avoid unjust enrichment of the defendants whose behavior in breach of their fiduciary duties made the litigation necessary. See generally Niles, "A Contemporary View of Liability for Breach of Trust," 29 *Record of the Association of the Bar of the City of New York* 573 (1974) (Hess Memorial Lecture).

The judgment entered by the District Court did not specify the precise amount of the monthly benefit to be paid, but only said the trustees are to "treat the application, for the purpose of calculating his wage related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record" (B-14). Accordingly, plaintiffs moved under Fed.R.Civ.P. 59(e) to alter or amend the judgment so as to provide such specificity as to the amount of the monthly benefit in order to avoid further controversy. (E-7)

The affidavit of Dr. Garfield submitted in support of the motion stated that a pension beginning January 1, 1985, would need to be in the amount of $2,730 per month in order to have a value equivalent to a $920 per month pension beginning May 1, 1977, based upon the life expectancy of Captain Chambless.

The response of the District Court was to avoid the issue in its judgment, and only to advise that the matter be taken up with the Court of Appeals on a cross-appeal since the pension plan already had indicated a desire to appeal its determination.

However, on the cross-appeal, the Court of Appeals merely said that Chambless was not entitled to receive retroactive benefits because of his employment on competitive vessels (A-20-21), thus effectively repudiating the decision that such a limitation was unlawfully "capricious" in the circumstances of this case. (B-10, quoted *supra* at pp. 3-4.)

Thus the issue that the District Court said that it had not considered, and passed on to the Court of Appeals, in response to plaintiffs' Rule 59(e) motion, *i.e.*, the approach and remedy set forth in the testimony and affidavit of Dr. Garfield (C-1, 2), was buried by the latter without comment, notwithstanding the fact that the District Court had already found the very suspension for competitive employment provisions that the Court of Appeals relied upon to be impermissibly discriminatory in their application to Captain Chambless (B-10):

> "The discrimination that the plan practices against retirees and applicants for retirement, barring participation in any maritime employment while allowing others to continue working in the maritime industries and permitting some retirees, pursuant to the 1981 collective bargaining agreement, to accept, after three years, employment on vessels engaged in offshore drilling, exploration and research, or on vessels ancillary to such operations, and permitting short time employment on vessels engaged in trial runs or being delivered, provided union approval is received and plan trustees notified, does not seem in the abstract so egregious as to come within the arbitrary or capricious prohibition. *Nonetheless, the bar became arbitrary and capricious in its application to Chambless.*" (Emphasis added.)

The inconsistency between the District Court's finding of unlawful discrimination under the plan's competitive employment prohibitions, and the use of those same provisions as a purported justification for denying a retroactive pension to Captain Chambless, is compounded by the recognition by both courts that "no forfeiture of benefits can be exacted from an employee for attempting to improve his position by accepting work with a competitor of his employer." (A-14)

If the testimony and affidavit of Dr. Garfield do not set forth circumstances of a forfeiture of a very substantial kind, the word has lost its meaning. When the purpose and effect of what the defendants have done, as the District Court found, are to have "confiscated a substantial part" of the pension benefits of Captain Chambless (B-9), the pension plan cannot equitably be permitted to retain the economic benefit from the funds that it held in its control while he has had to litigate his rights. It is unfair to penalize Captain Chambless because he did not give up his competitive employment, on which his family was dependent, while his case wound its way through the courts. No

reasonable person would have recommended that he risk putting himself in a position in which he could be bereft of both pension and employment during the time that he was forced to seek a judicial remedy.

The advantage derived from the retention of funds during litigation undoubtedly explains why the pension plan has never exhibited even the slightest interest in settling this case, even after it lost in the *Deak* case. The added burden that such an advantage places upon the judicial system by discouraging settlements is a further reason why its continuation should not be countenanced.

The District Court's decision, which was affirmed, emphatically condemned as "carpricious" the imposition of a penalty on Captain Chambless for accepting competitive employment under a different union's contract. (B-10)

Yet when the "bottom line" of dollars and cents is reached in the judgment, a capricious result is precisely what happened. In terms of this union's pension plan: a penalty has been imposed in the form of awarding a monthly pension benefit that is only nominally the same as what Captain Chambless admittedly could have received in 1977, but has a true economic value that is much less.

Even before ERISA, with its remedial purpose, the law of New York, where the pension plan maintained its offices, precluded the enforcement of a forteiture-for-competition clause when it was the conduct of the employer that led to the termination of employment. In *Post v. Merrill Lynch*, 48 N.Y.2d 84, 89 (1979), the New York Court of Appeals stated:

> *"An employer should not be permitted to use offensively an anti-competition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.*
>
> Under the circumstances of the case at bar it would be unconscionable to tolerate a forfeiture, precipitated as it is by the unwarranted action of the employer. We find, therefore, that in the case of an involuntary discharge, the rule stated in *Kristt* v. *Whelan* (4 AD2d 195, affd 5 NY2nd 807, *supra*) does not apply. Further we hold, that where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition,

would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand." (Emphasis added.)

At the very least, the findings of the District Court involving the Hobson's choice imposed upon older employees, in order to force them to retire, were tantamount to an unlawful constructive discharge.

In a case of first impression, the Ninth Circuit has held that a constructive discharge situation may result in a forfeiture of benefits for which a remedy is available under Section 510 of ERISA (29 U.S.C. §1140), even though the provisions of the plan could have been validly applied in the case of a voluntary termination. *Lojek v. Thomas*, 716 F.2d 675, 680 (9th Cir. 1983).

For the Court below to have read ERISA to permit the kind of a forfeiture that is both inconsistent with the Ninth Circuit's decision, and would not have been countenanced before its enactment, represents an anomaly that merits the attention of this Court.

II. WHETHER ERISA ELIMINATED ANTITRUST REMEDIES WARRANTS REVIEW

The prejudicial effect of the District Court's previously having dismissed the antitrust count on defendants' summary judgment motion became readily apparent at the trial of this case.

In his testimony, the president of the union admitted that the restrictive pension plan amendments were a direct outgrowth of the defendants' intention to thwart competition by the use of monopoly power. What the defendants had, Mr. Lowen said, ". . .was almost a monopoly and I say that in the labor sense of the word, a labor monopoly, and we looked at insuring that whatever we did in the plan, we wanted to make it unattractive for anyone to go anywhere's else. . . ." (I-2)

Lowen candidly admitted that the purpose of the restraints was to block competition from new entrants operating new vessels having more advanced technology and greater productivity than those operated by the older, longer-established companies that had contracted with the MM&P. (I-1). He stated, "Those two amendments were to insure that, one, we kept—we as the plan and our part of the industry kept available to us the officers that any new company out there needed to operate a ship." (I-2)

It will not be news to this Court that, through just such restraints, the United States Merchant Marine, once at the cutting edge of competition and the envy of the world, has been brought down to its present lowly state.

Indicative of the importance of review by this Court of the antitrust issue in an employment situation are the conflicting and contrasting discussions in recent law review notes on the subject. See Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 Mich. L. Rev. 1846 (1983); Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 Minn. L. Rev. 1011 (1983); Note, *Antitrust Standing of Terminated Employees*, 25 Wm. & Mary L. Rev. 341 (1983).

Since 1926, masters of ships have had an antitrust cause of action for restraints of trade that limit or reduce their compensation from employment under *Anderson v. Shipowners Ass'n of the West Coast*, 272 U.S. 359 (1926).

On the cross-appeal below, following the District Court's improper grant of summary judgment on the antitrust issue, see *Poller v. CBS*, 368 U.S. 464, 473 (1962), ERISA was relied upon to insulate the defendants from antitrust liability. The Court of Appeals stated (A-19-20):

> "To the extent that the claim is based on diminished retirement benefits, it is essentially an ERISA matter. See *Lourie Visual Aid Tools, Inc. v. Chesebrough-Ponds*, 473 F. Supp. 951, 960 (S.D.N.Y. 1979). We therefore hold that Chambless has not shown the requisite antitrust injury."

There is nothing either in ERISA or in the legislative history pertinent to ERISA that supports the conclusion that it was intended to repeal by implication available antitrust remedies.

On the contrary, ERISA was intended to add to remedies, not to detract from them. See *Duchow v. New York State Teamsters Conference and Retirement Fund*, 691 F.2d 74 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983).

As this Court has stated repeatedly, "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed" and is to be implied "[o]nly where there is a 'plain repugnancy between the antitrust and regulatory provisions.'" *Gordon v. New York Stock Ex-*

change, 422 U.S. 659, 682 (1975), quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51 (1963).

Captain Chambless is one of a group of supervisory employees represented by the union in this case, so the so-called labor exemption from the antitrust laws is not applicable. Further, in *United Mine Workers v. Pennington*, 381 U.S. 657, 665–66 (1965), it is emphasized that "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy."

Moreover, it has long been recognized that such activities as those here involved, designed to thwart competition in the maritime field, constitute antitrust violations. See *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793 (2d Cir. 1977).

The propensity of the M.M.&P. to engage in illegal and coercive activities in order to block competition is well established. See *International Organization of Masters, Mates & Pilots v. NLRB*, 575 F.2d 896 (D.C. Cir. 1978), involving the MOUNT EXPLORER, a ship on which Captain Chambless served.

Even the Impartial Umpire of the AFL-CIO condemned the coercive tactics of the union here involved as violations of Sections 2 and 3 of the AFL-CIO Constitution. *Between International Longshoremen's Association and National Marine Engineers Beneficial Association*, Determination re S/S MOUNT EXPLORER, Case No. 75108 (April 21, 1976).

The Circuit Court's allowance of an ERISA exemption for antitrust claims finds support in no other Circuit and is completely at odds with this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), which emphasizes that anti-competitive activities by a labor union and employers are not insulated from antitrust scrutiny simply because they may be the outgrowth of collective bargaining or a pension situation.

The antitrust damage calculation made on behalf of Captain Chambless is no mystery, contrary to the Court of Appeals' statement that "Chambless has not made clear exactly what his antitrust injury is." (A–19) The antitrust injury suffered by Captain Chambless is set forth specifically in plaintiffs' responses to defendants' interrogatories dated March 2, 1982. It includes (1) elements of reduced earnings of

$43,470 because of employment in junior positions foisted off on him by the union and shipping companies, as a part of their "fresh young blood" program to force the older employees to take lower paying positions or retire, and (2) reduced pension benefit estimated at $150,000, making a total of $193,470, to be trebled. (H-1-2).

The Court of Appeals also erred in stating that to the extent the antitrust claim "is based on a limiting of employment opportunities, [Captain Chambless] can claim no direct injury in light of his successful continued employment on non-MM&P vessels." (A-19)

Not only is the claim broader than that, as stated above, but the ruling also is directly inconsistent with *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. Feb. 20, 1985): "It is clear. . .that an antitrust plaintiff's post-violation successes do not necessarily preclude compensation for damages proximately caused by an antitrust violation." As pointed out in the Fifth Circuit's opinion, what is required is a factual analysis that cannot be decided, as it was improperly below, on a summary judgment motion.

The Court of Appeals cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), in support of its antitrust injury statement (A-19). However, the *Brunswick* case has not been thought to overrule *Radovich v. National Football League*, 352 U.S. 445 (1957).

The "business or property" of a ship's master working out of hiring halls, like Captain Chambless, rather than exclusively for a single employer, is more like the "business or property" of professional sports figures, for whom antitrust remedies are available. *See* Note, "Employee Standing Under Section 4 of the Clayton Act," 81 Mich. L. Rev. 1846 (1983). See also *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976) ("There can be little doubt that an employee that is deprived of a work opportunity has been injured in his 'commercial interests or enterprise,' because the selling of one's labor is a commercial interest.").

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-84 (1982), this Court emphasized that an anti-competitive scheme offering a "Hobson's choice" to its victims as a means of foreclosing competition or restraining trade constitutes antitrust injury. The existence of a "Hobson's choice" in the instant case is made clear by the findings of the District Court, as is the anti-competitive purpose of forcing older

licensed deck officers to retire and at the same time penalizing them if they work in competition with the ships operated by the employers here involved. (B-11).

Although the District Court found that Captain Chambless was or should have been aware of the possible consequences of taking forbidden competitive employment (B-9), he was found not to be aware of the full extent of the harsh consequences thereby entailed (B-9, B-12). Moreover, such knowledge did not impute any consent by him to the illegal Hobson's choice rammed down his throat, in any event, and would not constitute a defense to the antitrust cause of action. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Massachusetts Mutual Life Insurance Company v. Russell, ____ U.S. ____, 53 U.S.L.W. 4938 (1985), considered the narrow question of damages available for violations of Section 409(a) of ERISA. The Court expressly noted that (unlike the case at bar), the respondent therein had expressly disclaimed any reliance upon the equitable remedies provision of Section 502(a)(3). (53 U.S.L.W. 4940, at fn. 5.)

Thus, the *Massachusetts Mutual* case does not address the issue of the rights of Captain Chambless to an antitrust remedy; but this Court's grant of *certiorari* therein is indicative of the continuing importance of the question of remedies available in lawsuits that also embody ERISA claims. This also applies to the discussion of plaintiffs' remedies under Section 510 of ERISA, 29 U.S.C. § 1140, *infra* in Point III.

Review of the antitrust issue presented by this petition is particularly important on grounds of public policy. The *Deak* case decided in the United States District Court for the Middle District of Florida does not include an antitrust cause of action. However, the anti-competitive motive for the actions of the same pension plan trustees that the District Court there found to violate their fiduciary duties is made clear in the Court's opinion. (G-11-13) Therefore, unless review of the antitrust issue tendered by this petition is granted, the important public policy considerations that need to be addressed in the interest of effective antitrust enforcement will escape attention.

III. EQUITABLE REMEDIES UNDER ERISA SHOULD PROVIDE A FULL REMEDY FOR THE INJURY, AND NOT ONE THAT IS CONTRARY TO OTHER STATUTORY PURPOSES.

After declaring the action forfeiting his pension until age 65 to be "a nullity," the District Court conditioned the relief granted to Captain Chambless upon his permanently ceasing to work in the maritime industry within six months of the effective date of the judgment (B-13).*

Although the District Court did not discuss its reasons for imposing such a condition, the Court of Appeals found it to be "reasonable" on the ground that Captain Chambless was deemed to have had knowledge of the terms of certain of the pension plan regulations (A-21). However, this misses the point of *why* Captain Chambless was forced to seek other maritime employment, and the involuntary nature of his action. See *Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983), discussed *supra*.

Normally, of course, the form of equitable relief ordered by a District Court is subject to review only for an abuse of discretion.

In this case, however, the six-month condition imposed by the District Court produces a result that is diametrically opposed to public policy. We have already discussed the violations of ERISA and the antitrust laws that such a condition entails. Further, by conditioning the ability of Captain Chambless to obtain the pension to which he is found to be entitled upon an election to give up his career within six months, the decision of the District Court fosters age discrimination.

The purpose of the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) is to protect the right to older workers to remain employed. Forced retirement schemes below age 70 are clearly contrary to that policy. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 725 (2d Cir. 1984).

The six-month condition imposed by the District Court and affirmed by the Court of Appeals has just that forbidden effect.

---

* A stay of the mandate of the Court of Appeals that has the effect of staying this provision through November 26, 1985, or until final disposition of a petition for a writ of certiorari, was granted by the Court of Appeals on September 30, 1985, pursuant to a motion on behalf of petitioners.

It also has the effect of reinforcing, rather than abating and remedying, the discriminatory condition that gave rise to this lawsuit in the first place.

As the District Court specifically found, "In 1976, the union launched a plan to pressure older licensed deck officers to retire." (B-10).

The District Court also found that Amendment 47, which embodied this scheme sponsored by the union, "was intended to prevent older officers from escaping this Hobson's choice by taking non-M.M.&P. jobs." (B-11).

The employers agreed to go along with this scheme to limit the employment opportunities available to older workers for reasons of their own, as the District Court found. (B-11).

The effect of the six-month withdrawal from employment condition imposed by the District Court upon the ability of Captain Chambless to receive his full pension benefit is to countenance an aspect of what was found to be illegal.

As the District Court said, "The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P jobs matching the skills and experience they have acquired." (B-10) Yet this is precisely the consequence of the six-month condition imposed by that same Court upon the ability of Captain Chambless to receive his pension benefit.

. A full remedy for the intentional blocking of employment opportunities available to older licensed deck officers would be (a) to eliminate the six-month conditon and (b) to hold pursuant to Section 502(a)(3)(B) of ERISA (29 U.S.C. § 1132), that when they are forced to seek competitive work because of circumstances amounting to a constructive discharge, the equitable rule followed in *Post v. Merrill Lynch*, 48 N.Y.2d 84 (1979), quoted *supra*, at pp. 9-10, is applicable.

Neither employers nor unions with power over employment should be permitted to use offensively an anti-competitive device coupled with forfeiture of pension benefits to cripple economically a former employee and simultaneously deny other potential employers his services. *A fortiori*, a coalition of employers and a union acting in restraint of trade should not be able to accomplish the same result when the declared

purpose is to deprive older workers of opportunities contrary to the purpose of the age discrimination laws.

In *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1019 (W.D. Mo. 1984), the court concluded, after reviewing the statutory provisions of ERISA and their legislative history, that the courts are given a panoply of equitable powers in order to provide appropriate relief to remedy violations. Such relief, in addition to back pay, reinstatement or front pay, may include "forfeited employee benefits." (*Ibid.*)

It is submitted that the appropriate remedy in this case is payment of the full pension benefit without any diminution in economic value because of other employment of Captain Chambless, or because of the passage of time required to litigate his rights.

At issue is abusive behavior by defendants in violation of Section 510 of ERISA, 29 U.S.C. § 1140 condemned by the courts below. That provision makes it unlawful to "*discriminate* against a participant . . . for the purpose of *interfering with the attainment* of any right to which such participant *may* become entitled . . . (emphasis added), and specifically makes available for that purpose the equitable remedies provided under Section 502, 29 U.S.C. § 1132.

A full pension benefit without reduction under the M.M.&P. Pension Plan is certainly something to which Captain Chambless "may become entitled." Further, the findings of the District Court establish both that his achievement of that right was interfered with, and that he was discriminated against, by the defendants in this litigation.

In addition to the decision in *Folz v. Marriott Corp.*, *supra*, courts in other Circuits have given effect to a cause of action under Section 510 for discrimination and interference. See *Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (D.C. Pa. 1983), aff'd, 719 F.2d 670 (3d Cir. 1983), and *Kross v. Western Electric Co., Inc.*, 534 F. Supp. 251 (N.D. Ill. 1982), aff'd in part, reversed in part, 701 F.2d 1238 (7th Cir. 1983).

As noted above under Point I, the availability of such a remedy in a constructive discharge situation has been upheld by the Ninth Circuit in *Lojek v. Thomas*, 716 F.2d 675, 680 (9th Cir. 1983).

The limited nature of the relief granted to the plaintiffs in this case therefore warrants consideration by the Court of the guidelines that should be followed in fashioning remedies in cases of blatant discrim-

ination and interference with the attainment of rights ERISA affords pension plan participants.

IV. REVIEW SHOULD BE GRANTED TO AVOID RELIANCE UPON ERISA TO PERMIT THE IMPAIRMENT OF EXISTING CONTRACT RIGHTS.

On the cross-appeal, the Court of Appeals rejected the contention that Captain Chambless was entittled to his full pension without regard to age on the ground that in 1975 the pension plan adopted an amendment making age 65 the normal retirement age. (A-17) However, there is no such requirement in the plan for the pension to which Captain Chambless is entitled.

This misunderstanding was perpetrated by the pension plan notwithstanding the contrary testimony of its own administrator, Stephen P. Maher. Maher unequivocally admitted at the trial that age 65 has no application as a retirement age for Captain Chambless or to the type of pension to which he is entitled (Tr. 76-77):

"THE COURT: When was the 65 age [requirement] effected?

THE WITNESS: The deletion of it, your Honor?

THE COURT: No. No. It was deleted and it has been reinstated, has it not?

THE WITNESS: Not for this pension requirement. Not for pension requirements, your Honor.

. THE COURT: There is no requirement now at age 65?

THE WITNESS: Not for the regular pension.

THE COURT: I am sorry. I am sorry. All right. I misunderstood. At the present time there is no requirement for regular pension?

THE WITNESS: No age requirement, right.

THE COURT: No age requirement.

THE WITNESS: No age requirement. Just twenty years of service pension credit.

THE COURT: All right."

ERISA is often carelessly read in terms of an age 65 normal retirement age. However, what the Act in fact says specifically is that "normal retirement age" is the "earlier" of when a participant "attains normal retirement age under a plan" *or* age 65. (29 U.S.C. § 1002(24).)

As shown by the Maher testimony quoted above, which of course was given *after* the amendment referred to by the Court of Appeals had been adopted, "normal retirement age" under the M.M.&P. Plan is based upon 20 years of credited service for pension credit under the plan. Since Captain Chambless had earned more than 32 years of credits before he made his pension application, he had in fact attained "normal retirement age" under the Plan in conformity to ERISA's requirement that the "earlier" point be used.

This conclusion is buttressed by ERISA's definition of "normal retirement benefit" (29 U.S.C. § 1002(22)): It is ". . .the *greater* of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement . . . ." (Emphasis added.) See also *Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan*, 1 E.B.C. (BNA) 1868 (D.D.C. 1979).

As of May 1, 1977, after more than 30 years of credited service, Captain Chambless had reached the maximum level of pension benefit available to him under the M.M.&P. Pension Plan. As shown above, such entitlement was not dependent upon attainment of any specified age. Thus, under the pension plan, he was fully qualified to be considered as having both attained "normal retirement age" and qualified for the "normal retirement benefit."

The regulations promulgated under ERISA by government agencies are consistent with the foregoing interpretation. In language squarely applicable here, Treas. Regs. § 1.411(b) states: "For purposes of subdivision (i) of this subparagraph, *if an age is not specified by a plan as the normal retirement age*, then the normal retirement age under the plan is *the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service*." (Emphasis added.)

The foregoing definitions support the claim of Captain Chambless that, in order to satisfy the ERISA guarantee of non-forfeitability, actuarial adjustments to reflect his different life expectancy must be made

to insure that the value of the pension he receives today is no less than the value of what he would have received as of May 1, 1977.

The Preamble to the Regulations of the Department of Labor emphasizes that when benefits are suspended, the affected employee's benefit must be actuarially recalculated in order to compensate for benefit payments which were withheld. 2 PRENTICE-HALL, PENSION AND PROFIT-SHARING ¶ 90,332 at p. 90,763.

This result is mandated here particularly since, unlike the cases relied upon in the opinion of the Court of Appeals, the actual elimination of an age 65 requirement indisputably was the product of the bargaining history of the parties involved in this case, as the Maher testimony shows.

Attacked as "an unpardonable hardship" as early as 1961 by the president of the union was a pre-existing age 65 requirement. (H-4) Its elimination three years later as a result of collective bargaining, in return for a downward adjustment in wages to pay the cost, was heralded as a "major breakthrough". (H-3)

This contractual situation was not changed at any time prior to the adoption of pension plan Amendment 42 relied upon by the Court of Appeals (A-17), and Amendment 42 was not the outgrowth of any further bargaining development. It therefore could have no effect on the entitlement of Captain Chambless to a regular pension, and Mr. Maher admitted in his testimony that it did not.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 fn. 14 (1971), this Court stated:

> "Under the established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col.L.Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith v. Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis v. Benefit Coal Corp.*, 361 U.S. 459, 470 (1960)."

The foregoing statement was quoted with approval in *UMW v. Robinson*, 455 U.S. 562, 575 fn. 14 (1982).

What the bargaining history shows, therefore, is that Captain Chambless in effect paid for the elimination of the age 65 rule by a cut in pay. The enactment of ERISA can not properly be considered to be a basis for the elimination of a retirement benefit already enjoyed. See *Duchow v. New York State Teamsters Conference Pension and Retirement Fund*, 691 F.2d 74, 78 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983). The decision below is predicated upon the opposite assumption, and the importance of the issue provides a further reason for its review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: November 25, 1985

Respectfully submitted,

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street, Suite 1114
New York, New York 10036

(212) 730-0044

Attorney for Petitioners

Of Counsel:

John W. Whitlesey

85-930

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1985

No. .....

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

APPENDIX TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street
New York, New York 10036
(212) 730-0044
Attorneys for Petitioners

Of Counsel:
John W. Whittlesey

PRINTINGHOUSE PRESS – (212) 719-3120

TABLE OF CONTENTS FOR APPENDIX

PAGE

Decision of the United States Court of Appeals for the Second Circuit A-1

Decision of the United States District Court for the Southern District of New York filed August 8, 1984 ..... B-1

Judgment of the United States District Court for the Southern District of New York dated October 29, 1984 ..... B-14

Endorsement Order of the United States District Court for the Southern District of New York dated November 30, 1984 ..... C-1

Decision of the United States District Court for the Southern District of New York on Defendants' Summary Judgment Motion dated September 14, 1983 ..... D-1

Trial Testimony of Dr. Ralph Garfield, Expert Witness on Behalf of the Plaintiffs E-1

Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 59(e) dated November 8, 1984 ..... E-7

Affidavit of Dr. Ralph Garfield in Support of Plaintiffs' Rule 59(e) Motion E-9

Statutory Provisions Relied Upon F-1

Opinion of District Court in *Deak v. Masters, Mates and Pilots Pension Plan, et al.*, Middle District of Florida, Tampa Division G-1

Excerpts from Plaintiffs' Responses to Interrogatories dated March 22, 1982, Relating to Antitrust Damages H-1

Clipping entitled "End Age Rule on Vested Pensions" from *The Master, Mate & Pilot*, "The Official Voice of International Organization of Masters, Mates and Pilots," dated November, 1961 ..... H-3

Excerpts from Trial Testimony of Robert J. Lowen, President of the M.M.&P. I-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 994, 1086 — August Term, 1984

(Argued: May 20, 1985 Decided: August 28, 1985)

Docket Nos. 84-7987, 7989

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Plaintiffs-Appellees,
Cross-Appellants,

—v.—

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A. C. SCOTT, CAPT. JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEN SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WHITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pensions Plan,

Defendants-Appellants,
Cross-Appellees,

AMERADA HESS CORPORATION, AMOCO SHIPPING COMPANY, CENTRAL GULF LINES, INC., AMERICAN MARITIME ASSOCIATION, NATIONAL TRANSPORT CORP., WABASH TRANSPORT, INC., WATERMAN STEAMSHIP CORPORATION, MARITIME SERVICES COMMITTEE, INC., INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,
Defendants, Cross-Appellees.

Before:

FEINBERG, *Chief Judge*, VAN GRAAFEILAND and PIERCE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Carter, *Judge*, which held that appellees' pension benefits were improperly postponed and reduced based on an arbitrary and capricious amendment to the pension plan.

Affirmed and remanded.

ARTHUR M. WISEHART, New York, New York (Irene M. Opsahl, John Whittlesey, Wisehart & Koch, New York, N.Y., of counsel), *for Plaintiffs-Appellees, Cross-Appellants.*

BETTINA B. PLEVAN, New York, New York (Eileen Reinhardt, Joseph Baumgarten, Proskauer, Rose, Goetz & Mendelsohn, New York, N.Y., of counsel), *for Defendants-Appellants, Cross-Appellees.*

BURTON M. EPSTEIN, New York, New York (Steinberg & Tugendrajch, Hal R. Ginsburg, Levy & Tolman, New York, N.Y., of counsel), *for Defendant, Cross-Appellee International Organization of Masters, Mates & Pilots.*

PIERCE, *Circuit Judge*:

The Masters, Mates & Pilots Pension Plan, et al. (MM&P or the Plan) appeal from an order of the United States District Court for the Southern District of New York (Carter, *Judge*), dated August 2, 1984, which found that plaintiff Arthur Chambless' pension benefits were improperly postponed and reduced pursuant to an arbitrary and capricious amendment to the pension plan of which he and his wife are beneficiaries. The district court declared the amendment to be a nullity.

We hold that the district court was correct in finding that the amendment in question, while not violative of section 203 of ERISA, 29 U.S.C. § 1053(a), is arbitrary and capricious and is therefore a nullity and also that the amendment would cause an unlawful reduction of Chambless' wage-related benefit. Furthermore, in our view, the arguments made by plaintiffs in their cross appeal are without merit.

We affirm the decision of the district court.

BACKGROUND

The Plan, established in 1955, is a multi-employer plan designed to provide pension benefits to licensed deck officers who retire from sailing in the American Merchant

Marine. It is jointly administered by an equal number of employer-designated and International Organization of Masters, Mates & Pilots (Union)-designated Trustees, in accordance with section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), and regulations adopted by the Trustees of the Plan (Plan Regulations). The daily administration of the Plan, however, has been delegated to an administrator. Stephen Maher, now Executive Director of the Plan, functioned as Administrator from 1965-81. The Administrator decides initially whether an applicant satisfies the Plan's eligibility requirements and determines the appropriate pension benefit the applicant is entitled to receive. The funds used to provide benefits under the Plan are contributed solely by the participating employers.

In order to receive pension benefits, a participant with a sufficient number of pension credits must "retire" within the meaning of the Plan Regulations. The pertinent portion of the definition of retirement in effect during the period in question herein, i.e., April 1977, as set forth in Article II-A, Section 15(a) of the Plan Regulations stated: "To be considered retired, a person must withdraw completely from any further employment, in any capacity, aboard any vessel whatsoever."

As for the amount of pension benefits to be received, Article II-A, Section 3, of the Plan Regulations, adopted as Amendment 15 in 1966 as a result of collective bargaining, provides for wage-related pension benefits based on the "average base monthly wages of the employee during the period of any 5 consecutive years within the last ten years immediately preceding the effective date of the pension, which will produce the highest average for the employee."

On August 26, 1976, the Trustees adopted Amendments 46 and 47 as new Plan Regulations (the Amendments). Amendment 46 relates to individuals who have at one time retired. It states in pertinent part:

> If a Pensioner works in employment forbidden by this Section,
>
> 1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age . . . ; provided further, however, that if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean-going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P PMA Pension Plan . . . , then the Pensioner shall not be entitled to pension benefits for any month of such employment nor for any months prior to such Pensioner reaching his Normal Retirement Age . . . .

Amendment 47, on the other hand, relates to individuals prior to retirement. It states:

> In the event a Participant, subsequent to his accrual of credit for 10 years of vesting service and prior to his retirement, is employed in the capacity of a Licensed Deck officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P PMA Pension Plan . . . , such Participant shall not be entitled to any pension benefits prior to his reaching his Normal Retirement Age, as defined in Article I, Section 13.

In 1975, the Plan had already adopted Amendment 42, pursuant to which Article I, Section 13, stated that " 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation."

As the district court noted, Amendments 46 and 47, adopted during the following year, were discussed in articles by Robert Lowen, then the Plan's Secretary-Treasurer, and Stephen Maher, the Plan Administrator, which were published in the October 1976 issue of the Plan's newspaper, the *Pilot*. The articles highlighted the Plan Regulations' ban on prohibited employment and discussed the meaning of the Amendments. One of the articles contained the full text of the two provisions. The December 1976 issue of the newspaper further discussed the Amendments. Copies of the newspapers were distributed at Union hiring halls, and, according to the Plan, were mailed to the homes of Union members and pension participants.

Plaintiff Chambless sailed as a member of the Union from 1944 until 1977. He worked, at various times, as a third mate, second mate, chief mate, and master. In November, 1976, Chambless applied for pension benefits, but shortly thereafter withdrew his application and continued employment aboard vessels covered by collective bargaining agreements with the Union.

On April 2, 1977, Chambless filed a second application for retirement benefits. Chambless received a letter from Maher, Administrator of the Plan, informing him of the Plan's definition of retirement. On June 30, 1977, a Plan employee wrote to Chambless, informing him that his application was being considered and that his monthly benefits would be approximately $920, presumably based on his 33¼ years of pension service credits as of April 2,

1977 and his average salary for his five highest salary years between 1967 and 1977.

Following an inquiry from Maher, in November 1977, Chambless informed the Plan that, between March 18, 1977 and April 1, 1977 and then again between April 4, 1977 and September 13, 1977, allegedly after asking a Union agent whether there would be any Union problem created in doing so, he had been employed as a master on vessels which did not participate in the Plan. According to Chambless, such employment was necessary as a result of the Union exerting pressure on older licensed deck officers to retire, by giving them only low paying and low grade assignments. Whereas between 1966 and 1975 Chambless had regularly received assignments as chief mate or master, subsequently, he allegedly was told to retire or to accept assignments as second or third mate.

By letters dated January 26, 1978 and January 28, 1980, Maher responded to Chambless and to his attorney stating that: 1) because Chambless had not retired under the Plan's definition of retirement, he was not eligible for a pension at that time; 2) pursuant to the definition of retirement in Article II-A of the Plan Regulations and pursuant to Amendment 47, the Plan would not pay him any pension until December 7, 1986, at which time Chambless would reach age 65, which the Plan defines as "normal retirement age"; and 3) the monthly benefits he could expect upon reaching 65 would likely be $470.

On June 24, 1980, Chambless brought this suit against the Plan, Plan Administrator Stephen Maher, the Union, the Plan's employer and Union Trustees, the Maritime Services Committee and the American Maritime Association, employer organizations that do collective bargaining for shipping companies, and six shipping companies that

formerly employed Chambless, have contracts with the Union, and contribute to the Plan.

In his complaint, Chambless alleged that the Plan violated Section 203 of ERISA, 29 U.S.C. § 1053(a), by suspending payment of his vested pension after he went to work on a non-MM&P vessel. Moreover, according to Chambless, even if the Plan had the right to suspend pension payments when a retiree returned to work, it did not have the right to continue the suspension after the Plan participant went back into retirement. In addition, Chambless asserted that the Regulations would cause a forfeiture of his benefits by reducing them from an estimated $920 per month beginning at age 55 to an estimated $470 per month, beginning at age 65.

Among other allegations, Chambless also contended that: Amendment 47, by discriminating against Plan participants who worked on non-MM&P vessels, was punitive and arbitrary and capricious and therefore violated the trustees' fiduciary duties; the selection of age 65 for normal retirement age was a sham; at no time before he took employment on a non-MM&P vessel did the Plan or Union notify him of the effect of Amendment 47 on participants who took such employment; defendants inadequately reviewed his retirement application; the Plan improperly withheld information from him; defendants conspired in restraint of trade in violation of the Sherman Act; defendants, because of the assurances they allegedly gave him about accepting employment on non-MM&P vessels, were estopped from denying him benefits; the Union had breached its duty of fair representation by discriminating against senior seamen; and the plaintiffs had suffered emotional distress as a result of defendants' actions.

Chambless sought payment of his pension benefits retroactive to May 1, 1977, damages of $100 per day for the defendants' failure to provide him with certain pension information, treble antitrust damages, and punitive damages, costs, and attorneys' fees.

By opinion dated September 14, 1983, the district court granted defendants' motion for summary judgment on the following claims made by Chambless: that the Plan's review of his application was inadequate; that defendants were guilty of violating the Sherman Act; that the Plan improperly withheld information from him; that the selection of age 65 as the normal retirement age was a sham; and that defendants were estopped from suspending his benefits.

As for Chambless' claim that his benefits were forfeited by reducing them from $920 a month to $470 a month, the district court held that Chambless has no vested right to a $920 a month pension and that Amendment 47 did not violate the nonforfeitability requirements of ERISA. The court did find, however, that there was a dispute over the material issue of whether the provisions which caused Chambless' pension to be reduced were arbitrary and capricious and, therefore, the court denied summary judgment on this issue.

Similarly, as for Chambless' argument that he did not receive notice of the Amendment and its effect, the district court held that there was a dispute over the material issue of whether the Union took reasonable steps to ensure that Chambless was notified after the passage of Amendments 46 and 47 and before he took work prohibited under those Amendments. The court therefore also denied summary judgment on this issue.

At trial, a jury was empanelled to consider the claims for breach of the duty of fair representation, emotional distress, and compensatory and punitive damages. At the close of the plaintiffs' case, these claims were taken from the jury, dismissed by the court, and the jury was discharged.

The only issue remaining for determination was whether the forfeiture of Chambless' pension benefits until age 65 was arbitrary and capricious. Finding that the regulation pursuant to which Chambless' benefits were reduced "is not in the interest of plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund," Judge Carter, by order dated October 29, 1984, held that Amendment 47, as applied to Chambless, was arbitrary and capricious and ordered the Trustees to treat Chambless' application as if it had been made in 1977 and to grant him a wage-related pension based on his 1967-77 employment record, provided he retired and filed for benefits within six months of the date of the decision by the district court or within six months of a determination by the Court of Appeals, if the decision were appealed.

On appeal, the Plan contends that: 1) Amendment 47 is not arbitrary and capricious and therefore should not have been declared a nullity; 2) Amendment 47 did not cause an unlawful reduction of Chambless' wage-related benefit; and 3) the Plan gave adequate notice of the Amendment. Chambless and his wife cross appeal, contending that: 1) Amendment 47 is not only arbitrary and capricious but also violates section 203 of ERISA, 29 U.S.C. § 1053(a) which prohibits forfeiture of all vested pension benefits at normal retirement age; 2) the Plan should be estopped from not paying Chambless the

pension benefits he would have received had he retired in 1977; 3) the district court erred in dismissing his antitrust claim against defendant shipping companies; 4) the district court erred in dismissing the plaintiffs' claims for intentional infliction of emotonal dstress; 5) the district court erred by not awarding Chambless benefits retroactive to May 1, 1977 and by conditioning its judgment upon his retirement and filing for benefits within six months of the date of the court's decision; and 6) the district court erred in dismissing the plaintiffs' claim for punitive damages.

Finding that Amendment 47 was arbitrary and capricious, the district court declared the Amendment to be a nullity. *See Sharron* v. *Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562, 564 (11th Cir. 1983). We agree with this determination.

Discussion

Section 404(a) of ERISA, 29 U.S.C. § 1104(a)(1), states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . ." The Plan contends that Amendment 47 is justifiable, pursuant to § 1104(a)(1), in that it was adopted to enhance the financial integrity of the Plan. According to the Plan, the purpose of Amendment 47 is to preserve and enhance the corpus of the Plan by discouraging participants from making their services available to non-contributing employers. Also, the Plan purportedly believed that the Amendment would induce non-contributing employers to participate in the Plan in order to obtain access to trained licensed deck officers and would thereby decrease the claimed unfunded liability of the Plan. We find the Plan's argument unpersuasive.

First, the Plan failed to substantiate its claim of financial necessity and even failed to assert that alternative solutions were considered. *See Central Tool Company* v. *International Association of Machinists National Pension Fund, Benefit Plan A*, 523 F. Supp. 812, 817-18 (D.D.C. 1981). Second, the Plan's claim of financial necessity was unsupported by any actuarial data. *See Elser* v. *I.A.M. National Pension Fund*, 684 F.2d 648, 657 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 67 (1983); *Pompano* v. *Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914-15 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982). The Plan points to an actuarial valuation by its consultants for the year ending December 31, 1975. According to Chambless, and not contested by the Plan, however, this valuation was not even transmitted to the Plan until February 22, 1977, approximately six months after the Trustees' action that was assertedly "based in part" upon it. Moreover, the Plan's concern for its financial stability is undermined by a letter written by defendant Maher, the Plan Administrator, to participants only a month before Amendments 46 and 47 were adopted, in which Maher stated that the Plan was "financially sound." Third, as the district court noted, Amendment 47 was of Union origin, drafted by Union counsel, and the record is devoid of evidence showing that the Amendment benefited the Plan or its participants. Rather, evidence was introduced demonstrating that employer Trustees supported the Amendment to encourage participants to remain working as long as possible for employers who had contributed to the Plan, so that the employers could get their money's worth, whereas Union Trustees supported the Amendment to attract younger licensed deck officers. Neither the employer nor Union Trustees seemed to support the Amendment to enhance the financial integrity of the Plan itself. Fourth, we

note that in addressing a class action challenge to companion Amendment 46, a district court in *Deak* v. *Masters, Mates & Pilots Pension Plan*, No. 79-190, slip op. (M.D. Fla. June 4, 1984), determined that the Plan's assertions regarding the financial purpose of Amendment 46 "d[id] not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage." *Id.* at 16. Given the basic similarities between Amendments 46 and 47 and the fact that they were adopted at the same time, we conclude that the district court herein was correct in finding that Amendment 47 also was not adopted to enhance the financial integrity of the Plan or to benefit the Plan participants and is thus arbitrary and capricious.

The district court also concluded that, as to one in the position of plaintiff Chambless, the combined effect of Amendment 47 and Article II-A, Section 3 of the Plan Regulations (the wage-related provision) was arbitrary and capricious.

Article II-A, Section 3, of the Plan Regulations sets forth the monthly wage-related pension benefit as a percentage of pay and defines pay as "the average base monthly wages of the employee during the period of any 5 consecutive years within the last ten years *immediately preceding the effective date of the pension* . . . ." (emphasis added). Furthermore, according to this wage-related provision, a participant with thirty years of credit is to receive monthly pension benefits of $470 or 60% of pay, whichever is higher. Since the base years for calculating the wage-related pension are the ten years immediately prior to retirement and not necessarily the last ten years in covered employment, the ten years in question in Chambless' situation are the years during which he was

employed at a low rate of pay on non-MM&P vessels. Since 60% of Chambless' pay in the 5 highest paying years within the statutory period would be less than $470, his monthly pension would thus be $470. Consequently, by postponing benefits until age 65, pursuant to Amendment 47, and then ultilizing the wage-related formula to calculate those benefits, the amount of Chambless' pension was significantly reduced.

We agree with the district court that, by itself, Article II-A, Section 3, the wage-related provision, might not be arbitrary and capricious with regard to participants who apply for benefits immediately upon retiring and who do not take any other employment, and similarly with regard to participants who retire from covered employment, apply for a pension and then take work in a different industry. When Article II-A, Section 3 is applied in conjunction with Amendment 47, however, as occurred here, we believe it is arbitrary and capricious. Here, the combined effect of Amendment 47 and the wage-related provision essentially meant that Chambless, by accepting other work with a competitor who did not participate in the Plan, even for the purpose of avoiding the low paying and low grade assignments the Union was giving to older licensed deck officers, was placed in the position of postponing his pension until age 65 and thus could not have sought to fully retire beforehand, and he also was effectively reducing his pension benefit. In our view, the district court correctly held that no forfeiture of benefits can be exacted from an employee for attempting to improve his position by accepting work with a competitor of his employer. *Hummel* v. *S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *Westwood Chemical Co.* v. *Kulick*, 570 F. Supp. 1032, 1041-42 (S.D.N.Y. 1983).

Moreover, contrary to the Plan's contention, this Court's decision in *Morse* v. *Stanley*, 732 F.2d 1139 (2d Cir. 1984), stands for the proposition that suspension of benefits is permissible only if those benefits are not thereby reduced. As we stated, "[c]onsidering that . . . the plaintiffs . . . will each receive their vested benefits with interest upon reaching their normal retirement age (65), their contention that the Trustees acted arbitrarily or in bad faith in denying them accelerated distributions is without merit." *Id.* at 1144. Defendants' reliance on the *Morse* decision is misplaced.

Furthermore, even if the Plan is correct in maintaining that the wage-related provision of the Plan Regulations, since it is the result of a collective bargaining agreement, may not be found to be arbitrary and capricious in itself, *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 576 (1982), as the district court stated, it is not the wage-related provision which is being contested herein. Moreover, as Chambless notes, *Robinson* is limited to a situation in which the provision in question is both an outgrowth of a collective bargaining agreement and not otherwise violative of federal law or policy. *Id.* at 575. Here, the wage-related provision, Article II-A, Section 3, as applied to the present circumstances, i.e., combined with Amendment 47, would violate the Trustees' fiduciary duty to act solely in the interest of the participants and beneficiaries, as required by ERISA, 29 U.S.C. § 1104(a). For the foregoing reasons, we agree with the district court's finding that Amendment 47 is arbitrary and capricious and is therefore a nullity.

With regard to notice, the district court held that both the method of distributing notice about the impact

of the Amendment and the content of the notice were inadequate.

Regarding the adequacy of distributing information about Amendment 47, while defendants contend that the newspaper was mailed to all participants at their homes, the district court found that the newspapers discussing the Amendment were merely left at the Union hiring hall and were not mailed directly to Plan participants. The district court therefore held that such distribution was inadequate.

We believe that, even if distribution of the newspaper were adequate, the content of the notice regarding Amendment 47 was inadequate. We are unpersuaded by defendants' contention that because the method of calculating wage-related benefits had not changed since its introduction in 1968 and because Chambless received notice of that method at that time, no new notice by the Plan was required. Rather, as the district court found, neither of the publications regarding Amendment 47 explained the full import of the interaction of the wage-related provision and the Amendment for someone in Chambless' position. Thus, in our view, the notice was insufficient to satisfy the requirements of ERISA, 29 U.S.C. § 1022(a) and (b) and § 1024(b)(1) (plans must furnish to participants clear, timely explanations of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.").

In his cross-appeal, Chambless makes several claims. First, he contends that the suspension of his pension until age 65 violates section 203(a) of ERISA, 29 U.S.C. § 1053(a), which states in pertinent part: "Each pension plan shall provide that an employee's right to his normal

retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . ." According to Chambless, he is entitled to a "normal pension," without regard to age, since he has over twenty years of pension service credits. We find Chambless' argument to be without merit. While prior to 1975, age was not a factor in determining entitlement to pension benefits, in December 1975, the Plan adopted Amendment 42, which tracks the language of ERISA and pursuant to which Article I, Section 13 states that " 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation."

In addition, we have held that postponement of retirement benefits until age 65 need not constitute an unlawful forfeiture, violative of ERISA. *Riley* v. *MEBA Pension Trust*, 452 F. Supp. 117, 120 (S.D.N.Y.), *aff'd*, 586 F.2d 968 (2d Cir. 1978) ("The Act, on its face, requires only that pension benefits be nonforfeitable upon attainment of normal retirement age, in this case, age sixty-five. The Act, therefore, gives plaintiff no vested right to receive benefits until he reaches that age."); *see Fine* v. *Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983); *Hurn* v. *Retirement Fund Trust*, 648 F.2d 1252, 1253-54 (9th Cir. 1981). Based on the above, we conclude that, since Chambless has not reached age 65, suspension of his benefits violates neither ERISA nor the Plan itself.

Chambless next maintains, in his cross-appeal, that the Plan should be estopped from not paying him the pension benefits he would have received had he retired in 1977 and not worked for non-MM&P vessels. Chambless alleges that it was only after asking a Union agent whether it would be permissible for him to do so, that he took an assignment as master on a vessel that did not participate in the Plan.

In our view, Chambless' allegations regarding representations made to him by a Union representative are insufficient to support a claim of estoppel against the Plan. We have held that because "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan," *Phillips* v. *Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (quoted in *Haeberle* v. *Board of Trustees of Buffalo Carpenters Health-Care Funds*, 624 F.2d 1132, 1139 (2d Cir. 1980)), "courts have been reluctant to apply the estoppel doctrine to require the payment of pension funds." *Haeberle*, 624 F.2d at 1139. As the district court stated herein, "[i]f such funds are too vital to allow plan trustees to obligate the fund through their representations, *a fortiori* union officials—who are not as clearly identified with pension funds as are trustees—should not be permitted to commit the funds to persons not entitled to them." *Chambless* v. *Masters, Mates & Pilots Pension Plan*, 571 F. Supp. 1430, 1452 (S.D.N.Y. 1983); *see Galvez* v. *Local 804 Welfare Trust Fund*, 543 F. Supp. 316, 318 (E.D.N.Y. 1982). We agree with the position articulated in *Chamberlin* v. *Bakery & Confectionery Union Pension Fund*, 99 L.R.R.M. 3176 (N.D. Cal. 1977), where the court stated:

> To permit . . . a single oral statement by a union business agent to obligate the trust to provide benefits to persons not otherwise entitled to them would seriously erode the requirement that the fund be administered by representatives of both the employe[r] and the employees solely for the benefit of employees of the contributing employer. 29 U.S.C. § 186(c)(5). Any such erosion can create a loophole that would enable the unscrupulous to divert funds away from the proper parties . . . .

Id. at 3180.

Furthermore, as the district court noted, Chambless admits that he never discussed with any Union representative the specific effect that employment on non-MM&P vessels would have on his pension, as opposed to whether the Union itself would object to such employment. 571 F. Supp. at 1451. Rather, according to Chambless' testimony, the Union representative merely told Chambless that "lots of our members does [sic] that [i.e., work on non-MM&P vessels] . . . . Don't worry about it . . . . You go right ahead if you want to go out there and work . . . ."

Based on the above, we believe that the district court correctly granted summary judgment dismissing the claim that the Plan is estopped from suspending Chambless' benefits.

Chambless' third contention in his cross-appeal is that the district court erred in dismissing the antitrust claim against the shipping companies. According to Chambless, the suspension of pension benefits until normal retirement age under Amendment 47 and the decrease in those benefits created "a hindrance and interference with the ability of licensed deck officers to market their skill," thereby creating an antitrust violation under the Sherman Act, 15 U.S.C. §§ 1-2.

The Supreme Court has held that, even if there has been a violation of the antitrust laws, an award of treble damages is proper only when there has been an antitrust injury. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Chambless has not made clear exactly what his antitrust injury is. To the extent that Chambless' antitrust claim is based on a limiting of employment opportunities, he can claim no direct injury in light of his successful continued employment on non-MM&P vessels. To the extent that the claim is based on

diminished retirement benefits, it is essentially an ERISA matter. *See Laurie Visual Etudes, Inc.* v. *Chesebrough-Ponds, Inc.*, 473 F. Supp. 951, 960 (S.D.N.Y. 1979). We therefore hold that Chambless has not shown the requisite antitrust injury.

Chambless' fourth contention in his cross-appeal is that the district court erred in dismissing the plaintiffs' claims for intentional infliction of emotional distress against the Plan and the Union. We believe these claims were properly dismissed. With regard to the claim by Chambless' spouse, we believe that the district court did not abuse its discretion in finding that there was insufficient evidence to raise a jury question. With regard to Chambless' own action to recover damages based upon alleged emotional distress, we believe that the claim was properly dismissed because of the absence of any evidence to support his claim.

Chambless' fifth contention in his cross-appeal is that, based on the district court's findings, he should have been awarded benefits retroactive to May 1, 1977 and also that the district court erred in conditioning its judgment upon his retiring and filing for benefits within six months of the date of the court's decision. We agree with the district court. Regarding retroactivity, as the Plan states, because Chambless has worked continuously in the maritime industry since May 1, 1977, and has not "withdraw[n] completely from any . . . employment . . . aboard any vessel whatsoever," as required by Article II-A, Section 15(a)'s definition of retirement, Chambless has not been eligible to receive a pension. We have upheld rules for suspending benefits of individuals who have not retired within the meaning of the Regulations. *Riley*, 570 F.2d at 412. We therefore believe that the district court was correct in not awarding retroactive benefits but instead

requiring the Plan to pay Chambless, upon his retirement, the monthly amount he would have received had he retired in 1977.

Regarding the six month proviso, we also agree with the district court. Even if Amendment 47 is a nullity, both the wage-related provision, Article II-A, Section 3, and the definition of retirement, Article II-A, Section 15(a), of which Chambless was on notice in 1977 when he applied for benefits, remain intact. Therefore, when Chambless applied for benefits in 1977, he is deemed to have known that: the amount of his retirement benefit would be based upon his salary during the ten year period immediately prior to his retirement; if he continued to work thereafter on non-MM&P vessels, his retirement date would continue to advance; and the amount of his pension probably would be reduced by virtue of adding to the ten year period an increasing number of years of uncovered and lower paying employment. Since the district court decision gives Chambless the advantage of figuring his wage-related benefits as of 1977, i.e., based upon his last years of higher paying covered employment, and not upon the ten year period immediately prior to his retirement, we believe it is reasonable for this advantage to be conditioned upon Chambless' ceasing to work and filing for benefits within six months of a decision rendered by this Court.

Finally, the plaintiffs contend that the district court erred in dismissing their claim for punitive damages. We disagree. The issue of the availability of punitive damages under ERISA is now before the Supreme Court in *Russell* v. *Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 81 (1984). As defendants argue, even where courts have concluded that punitive damages are available under

ERISA, they have required a showing of wanton or malicious conduct, *see, e.g., id.* at 492; *Korn* v. *Levine Bros. Iron Works Corp.*, 574 F. Supp. 836, 843 (S.D.N.Y. 1983), of which there is no evidence herein. Indeed, the district court stated that it did "not believe that the trustees willfully withheld information from Chambless or other participants as to the effective reach and full impact of Amendment 47." Furthermore, we note that in *Deak*, slip op. at 20, in which related Amendment 46 was at issue, the court held that the Trustees' actions were not so " 'malicious, flagrant or outrageous,' as to justify the imposition of punitive damages." (citations omitted). In our view, the district court herein was correct in making a similar finding with regard to Amendment 47 and in dismissing the plaintiffs' claims for punitive damages.

For the foregoing reasons, we affirm the decision of the district court in all respects and remand for a determination of the benefits which Chambless would have received in 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 4258 (RLC)

Filed August 8, 1984

ARTHUR CHAMBLESS
and MILDRED H. CHAMBLESS,

Plaintiffs,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

OPINION

CARTER, District Judge

Background Facts

Plaintiff, Albert Chambless, became a member of the International Organization of Masters, Mates & Pilots ("MM&P") in 1944 after being issued a third mate's license. He is a resident of Alabama and received all of his MM&P work assignments through the union hiring hall in Mobile, Alabama. He obtained his master's license in 1956, and his first assignment as a master in August, 1966, when he was given command of the Frontenac Victory. This assignment lasted until May, 1968. Thereafter, Chambless regularly hired out as master or chief mate through 1975.

The MM&P pension plan ("plan") was established in 1955. It is an employer-funded pension and trust fund that provides retirement benefits for MM&P licensed deck officers. The plan is administered by an equal number of employee and employer designated trustees who have broad powers to formulate regulations for the administration

of the plan. The trustees have delegated the day to day operation of the plan to an administrator. Stephen Maher, now Executive Director of the plan, functioned as administrator from 1965-1981. The administrator decides initially whether an applicant satisfies the plan's eligibility requirements and determines the appropriate pension benefit the applicant is entitled to receive. His decisions are presented to the trustees for approval. The administrator's determination that an applicant is not entitled to benefits does not reach the trustees unless the applicant appeals, in which case the trustees then determine whether to uphold or reject the administrator's determination.

The trustees have formulated a large body of regulations governing the plan's operations. Prior to the enactment of ERISA, 29 U.S.C. § 100, *et seq.*, the plan's regulations provided for normal retirement without regard to age, after 20 years of pension service credits. Pursuant to the terms of the 1966 collective bargaining agreement, the plan was amended to provide for wage related pension benefits based on the average salary for the five highest salary years in the last ten years prior to the effective date of retirement.

Prior to August, 1976, retirement was defined in Article II, Section 13a of the plan regulations as complete withdrawal from "further employment in any capacity in the maritime industry", except that the trustees "in their sole discretion could permit [a retiree to work] in shoreside positions covered by a collective bargaining agreement by the [union], and upon application submitted through the [union], [to work] as a marine surveyor or employment aboard fishing vessels, yachts and other small craft (such as supply boats) provided employment [is] in a capacity, not covered by the collective bargaining agreements of the [union]."

Article II, Section 13(b) provided that if a retiree worked in employment forbidden by Section 13a, he forfeited his pension benefits for the month he worked and for six additional months. He had to return all benefits received and if he failed or refused to do so, all future benefits could be denied. The retiree had to notify the trustees in writing within 15 days of the commencement of forbidden employment, and the trustees were empowered to disqualify him permanently from receiving any future pension benefits if he failed to do so.

In December, 1975 the plan adopted Amendment 42 which added a new Section 13 to Article I. Normal retirement age was defined

as "age 65, or, if later, the age of the participant on the tenth anniversary of his participation. All references to 'Normal Pension' [were] changed to read 'Regular Pension' ".

In 1976, Walter Anderson, who was in charge of the hiring hall in Mobile, Alabama, sought to induce Chambless to retire in accord with then current union policy. Anderson advised Chambless that the union wanted all the older licensed deck officers to retire and that if Chambless did not retire, he could expect to be shipped out on second or third mate assignments. During 1976 and 1977 all of Chambless' assignments through the Mobile, Alabama hiring hall were in second or third mate jobs. In a letter dated March 17, 1979, sent to all offshore ports, Robert Lowen, Union President, discussed the union's effort to secure non-wage related benefits and other incentives to induce older deck officers to retire.

Chambless apparently succumbed to the pressure and filed an application for retirement benefits on November 12, 1976, but then, having second thoughts, withdrew the application. On April 2, 1977, he filed a second application. At that time he was advised that his retirement benefits would be approximately $920 per month. This calculation was presumably based on his 33¼ years of pension service credits as of April 2, 1977, and his average salary for his five highest salary years between 1967 and 1977, which appear to be 1970-1975 when he sailed two times as master (6/10/73-9/30/74 Hess Petrol; 7/1/75-11/24/75 Greenport) and five times as chief mate (1/1/70-2/11/70, Spirit of Liberty; 5/25/70-1/1/71, Golden Gate; 8/6/71-3/31/73 Hess Voyager; 4/9/73-6/9/73, Hess Petrol; 2/14/75-4/10/75, Hess Refiner).

Prior to filing his application, Chambless had accepted employment as a master (3/18/77-4/1/77) on the Mission Viking, a vessel owned by a company not a party to a collective bargaining agreement with MM&P. He testified that before accepting this assignment, he had spoken to the dispatcher at the union hiring hall in Mobile, Alabama and was advised that there would be no problem. Two days after the filing of his April 2, 1977 application, he accepted assignment as master on the Mount Explorer, another non-MM&P contract vessel. That assignment did not end until September 13, 1977. The Mission Viking was an oil drilling rig. The Mount Explorer was a U.S. flag ocean going vessel.

On August 24, 1976, the trustees adopted amendments 46 and 47 as new plan regulations. These amendments were proposed by union designated trustees and drafted by union counsel who advised the trustees that the two proposals were not at odds with any ERISA provision. Amendment 46 provides that retirees working in forbidden employment are not entitled to any pension benefits during such employment and for six months thereafter, provided the six month penalty does not extend beyond the retiree's normal retirement age. Moreover, if a retiree works as a licensed deck officer on a U.S. flag ocean going vessel owned by a company not participating in the MM&P plan, the retiree forfeits his pension benefits until normal retirement. Amendment 47 provides that an active member (i.e. one not yet retired) who, subsequent to acquiring 10 years of vesting service, works as a licensed deck officer on a United States flag ocean going vessel for a company not under contract with MM&P, shall not be entitled to any pension benefits until normal retirement age.

The two new amendments were discussed in articles by Robert Lowen, then MM&P Secretary Treasurer and Stephen Maher, plan administrator, published in the October, 1976 issue of the MM&P newspaper, *The Pilot*. Lowen's article called attention to the regulations' ban on prohibited employment. Maher's article highlighted the same theme in a short explanation of the amendments' meaning, and his article carried the full text of the two provisions. In a later article published in the December, 1976 issue of the newspaper, Maher again focused on the two regulations and discussed their importance.

Copies of the newspaper, distributed at union hiring halls in various ports from which the union operates, are not mailed to union members or pension participants. Booklets concerning the pension plan and explaining the regulations are sent to plan participants but the texts of neither the regulations or amendments are sent directly to union members. The first communication directly to the plan participants about Amendment 47 is a letter from Maher dated March 13, 1978, which states in pertinent part:

> Further, subsequent to accruing ten (10) years of vesting service credit and prior to retirement, if you work as a Licensed Deck Officer aboard U.S. flag ocean going vessels which are operated by a company which is not a participant in an MM&P Pension Plan (excluding civilian employment with the Military Sealift

> Command or another government entity) you will not be entitled to any pension benefits prior to reaching Normal Retirement Age (Normal Retirement Age means age 65 or, if after, the age of the participant on the tenth (10th) anniversary of his participation).
>
> An excerpt of the Pension Regulations pertaining to vested pension credit is attached.
>
> I urge you to read the attached language carefully, as violation of the Rules will affect payment of your pension benefit, as well as, any survivor's options.

Plaintiff's Ex. 38.

On July 19, 1977, Maher wrote asking Chambless to confirm or deny that he was working as a licensed deck officer on a ship not under MM&P contract. Defendants' Ex. M. Chambless replied in an undated letter confirming that he had accepted employment aboard a non-MM&P vessel and inquired whether his pension would be "payable as soon as he ceases such employment and withdraws completely from employment aboard a vessel." There is no direct reply to this latter inquiry in the record.

Chambless was subsequently advised by Maher that his pension application had been denied and that because of his acceptance of employment as a licensed deck officer with a company not under contract with MM&P, he had forfeited all rights to pension benefits until age 65. He was further advised that his estimated pension benefits at age 65 would be $470 per month, not the $920 figure previously given to him. Chambless appealed to the trustees who ratified the decision of the administrator.

The Claims Involved

Plaintiffs (Chambless and his wife) instituted the instant action in 1980 making a wide variety of claims including antitrust infractions by the shipping companies, breach of the duty of fair representation by the union, breach of fiduciary duties as well as a variety of other ERISA violations by the plan and its trustees, and the infliction of emotional distress on both plaintiffs by the union and plan trustees. Both compensatory and punitive damages were sought. Early on in the litigation all claims against the trustees in their individual capacities were dismissed, and the litigation proceeded against the trustees in their official capacities only.

Many of the claims were dismissed when the court granted partial summary judgment for defendants in an opinion reported at 571 F. Supp. 1430 (1983), with which familiarity is assumed. At trial a jury was empanelled to consider the claims for breach of the duty of fair representation, for emotional distress, and for compensatory and punitive damages against the union and the trustees. At the close of the plaintiffs' case those claims were taken from the jury and dismissed by the court, applying the standard enunciated in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970) and cognate cases, *see e.g. Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167 (2d Cir. 1980).

This resulted in the dismissal of all claims against the union and all claims concerning Mrs. Chambless, leaving Chambless as the sole plaintiff in the case. What remained to be decided was whether the forfeiture of Chambless' pension benefits until age 65 by the plan trustees was arbitrary and capricious. Since that matter was an issue for court determination, the jury was dismissed and the trial proceeded to the court. Subsequent to the conclusion of the trial, the parties submitted post-trial proposed findings of fact and memoranda of law.

Determination

Chambless claims that the suspension of his pension until age 65 violates Section 203 of ERISA, 29 U.S.C. § 1053(a). Prior to December, 1975, a plan participant was entitled to what was described as a normal pension after 20 years of pension service credits. Age was not a factor. The regulations were changed in December, 1975 to conform to ERISA language, 29 U.S.C. § 1053(a), prohibit all vested pension benefits from forfeiture at normal retirement age. The statute defines normal retirement age as 65 years of age, or if later, the 10th anniversary of a participant's participation in the plan. Amendment 42 to the plan regulations tracks this statutory language. It is clear that ERISA imposes no obligation to pay retirement benefits to a plan participant before he reaches age 65. *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983). *Riley v. MEBA Pension Trust (Riley II)*, 452 F. Supp. 117, 120 (S.D.N.Y.) (MacMahon, J.), *aff'd* 586 F.2d 968, 970 (2d Cir. 1978; *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1253-54 (9th Cir. 1981). *See also Morse v. Stanley*, 732 F.2d 1139, 1144 (2d Cir. 1984) ("Considering that . . .the plaintiffs. . .will each receive their vested benefits with interest upon reaching their normal retirement

age (65), their contention that the trustees acted arbitrarily or in bad faith in denying them accelerated benefits is without merit"). Moreover, where the trustees act within the law their determinations may be disturbed by court order only on a showing of bad faith, caprice or arbitrariness. *Riley v. MEBA Pension Trust (Riley I)*, 570 F.2d 406, 410 (2d Cir. 1977); *Fine v. Semet, supra; Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97 (5th Cir. 1979).

The trustees are required to provide plan participants with a summary plan description which sets forth circumstances which may result in disqualification, ineligibility, denial or loss of benefits. 29 U.S.C. 1022a(1), (2)(b). Neither the administrator nor the trustees complied with this requirement before forfeiting Chambless' benefits. The record discloses that Amendment 47 to the regulations, pursuant to which Chambless' application was denied and he was held to have forefeited his right to a pension until age 65, was adopted August, 1976. The amendment was discussed in articles by Lowen and Maher in the October, 1976 issue of the union newspaper. In Maher's column the text of the amendment was set out in full. The matter was again discussed in another article by Maher in the December, 1976 issue of the union newspaper. As I understand it the newspaper is distributed in quantity at various union hiring halls at offshore ports. Chambless says he never saw the articles. There is testimony that about 200 copies of the October issue of the MM&P newspaper would normally be sent to Mobile arriving about the first two weeks of November. The copies are stacked on a table in the hall. A secretary in the Mobile office testified by deposition that Chambless had knowledge of Amendment 47 before filing his application. She states that she discussed the matter thoroughly with him and that she wrote the plan office for information on the amount Chambless was expected to receive in pension benefits when he retired. (Dep. Mary Smith at 118). I do not credit the testimony that Chambless and the secretary discussed Amendment 47 thoroughly. Amendment 47 had no conceivable impact on Smith sufficient to stimulate her interest in the provisions to the point that she would be able to discuss it thoroughly with anybody. In any event, it is the trustees' responsibility to get the necessary information to the participants. Chambless' vicarious receipt of this knowledge through third parties not connected with the plan does not suffice. Moreover, while it is clear from Chambless' response to Maher's inquiry about engaging

in forbidden employment that he knew that he would be barred from receiving any pension until he had actually retired, I am satisfied that he did not understand the impact which Amendment 47 would have on his pension rights.

There is no evidence of any act by the plan or union to clarify that impact for participants. What was published in the various articles was the simple message that forbidden employment would result in forfeiture of the right to retirement benefits until age 65. Neither the articles in the October and December issue of the newspaper nor even the letter sent to all participants dated 13 March 1978 explained the full import of the forfeiture of the right to benefits until age 65 to a participant such as Chambless with 32¼ years of pension service credits. The forfeiture until age 65 brought into play an additional factor not mentioned in any of these statements concerning the amendment. A wage related pension benefit provision accords a participant the right to have his benefits based on the average of his highest salary for five of his last ten years before retirement during which he earned the most. Denying Chambless the right to a pension until age 65 meant not only that his pension was postponed, but since the ten years preceeding the year in which he turns age 65 meant not only that his pension was postponed, but since the ten years preceeding the year in which he turns age 65, 1976-1986, cover a period in which he will earn nothing on MM&P jobs, the wage related formula pursuant to which he would have obtained a generous pension would not apply. His benefits would be determined under a different formula which results in reducing his benefits to roughly half of what he would have received in 1977 based on a wage related formula.

While the court does not believe the trustees willfully withheld information from Chambless or other participants as to the effective reach and full import of Amendment 47, the statutory requirement of full disclosure has no meaning in this context unless the trustees are required to advise participants fully of what effect a new regulation will have before they can penalize a participant for violating the regulation. Defendants contended at trial that Chambless knew, or should have been able to figure out by taking into account the wage related provision, the effect forfeiture until age 65 would have on his pension benefits. It is not all that obvious, however, and it seems to me inequitable to enforce the new provision without first having its full effect explained to all participants. In my judgment, therefore,

the trustees were barred in 1977 from applying Amendment 47 to Chambless before first explaining all of its implications to him. It is clear enough that Chambless believed he might be denied his pension for the period he continued to work. He was not aware, however, that by taking a non-MM&P assignment he had forfeited his rights to a pension until age 65 and moreover that the forfeiture carried an added penalty of halving the benefits he had been advised he would receive.

Amendment 47 is arbitrary and capricious in any event. In *Riley v. MEBA Trust Fund (Riley I)*, *supra* at 413, the Second Circuit stated that "new federal standards of fairness must apply with respect to charges of breach of fiduciary duty not explicitly covered by Part 4 of ERISA", but concluded that it knew of no applicable federal standard other than the arbitrary or capricious yardstick. Suspension of benefits until age 65 is, of course, permissible. *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, ____ U.S. ____ 104 S.Ct. 2387 (1984); *Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 460 F. Supp. 112 (C.D.Ca. 1978), *aff'd*, 648 F.2d 1252 (9th Cir. 1981). However, the right to suspend benefits until age 65 is of no comfort to defendants. They have not only suspended Chambless' rights to benefits until age 65 but have confiscated a considerable part of those benefits. While the cases allow suspension, none has approved a formula where the suspension results in greatly reduced benefits. Indeed, in *Morse v. Stanley, supra*, the court was satisfied that all of plaintiffs' accrued benefits would be received, with interest, when they reached age 65 and explicitly cited this factor in setting forth its reasons for allowing the funds to be withheld.

Defendants argue that since the wage related benefits were incorporated into the pension plan pursuant to a collective bargaining agreement, the trustees' enforcement was required unless modification was necessary to comply with applicable federal standards and that the arbitrary and capricious standard is not applicable. *See United Mine Workers of America Health & Retirement Fund v. Robinson*, 455 U.S. 562 (1982). That contention, however, misses the point. The wage related provision is not being contested. What is questioned is the trustees' right to forfeit a plan participant's vested rights by taking action which results both in suspending his benefits until age 65 and in reducing much of the accrued and vested pension benefits.

The discrimination that the plan practices against retirees and applicants for retirement, barring participation in any maritime employment while allowing others to continue working in the maritime industries and permiting [sic] some retirees, pursuant to the 1981 collective bargaining agreement, to accept, after three years, employment on vessels engaged in offshore drilling, exploration and research, or on vessels ancillary to such operations, and permitting short time employment on vessels engaged in trial runs or being delivered, provided union approval is received and plan trustees are notified. does not seem in the abstract so egregious as to come within the arbitrary or capricious prohibition. Nonetheless, the bar became arbitrary and capricious in its application to Chambless.

In 1976, the union launched a plan to pressure older licensed deck officers to retire. Chambless, who between 1966 and 1975 had regularly received assignments as chief mate or master, was told either to retire or to accept only the lowest grade assignment – second or third mate. Indeed, his only assignments from MM&P hiring halls during 1976 and 1979 were second and third mate jobs. Subsequent to the events in this case, the union sought, through collective bargaining agreement, to secure for older licensed deck officers pension benefits that were not wage related. This would have enabled the union to continue its policy of giving choice assignments to younger men without unduly penalizing the older officers. As of 1979 the union had not succeeded in exacting those benefits from the employer.

The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P in jobs matching the skills and experience they have acquired. This is another reason why the penalty imposed on Chambless for accepting employment as a master on ships operated by companies not under contract to MM&P is capricious.

A retiree who works in forbidden employment but not as a licensed deck officer on a U.S. flag ocean going vessel operated by a company not under contract to MM&P forfeits his pension for the time he is working and for six months thereafter. One, however, who works as a licensed deck officer on a U.S. vessel under the jurisdiction of a rival union forfeits his pension until age 65. This regulation does not conform to ERISA requirements. It is evident that no forfeiture of

benefits can be exacted for competing with an employer. *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Westwood Chemical Co., Inc., v. Kulick*, 570 F. Supp. 1032, 1034 (S.D.N.Y. 1983) (Werker, J.); *Bonar v. Barnett Bank of Jacksonville*, 488 F. Supp. 365 (M.D. Fla. 1980). Trustees have a fiduciary obligation to act with care, skill, prudence and diligence, 29 U.S.C. §1104 (a)(1)(B), and they must administer the plan solely in the interest of the participants and their beneficiaries. The trustees' basic fiduciary obligation is to maintain the pension fund on a sound economic and actuarial basis. They must not favor one group of participants over others, but where action is taken to preserve or maintain the integrity of the fund which incidentally disadvantages one group of participants, no fiduciary breach of trust has occurred.

In this instance there was testimony by one of the employer designated trustees that he favored Amendment 46's and Amendment 47's forfeiture of benefits for participants who worked for parties not contributing to the MM&P plan, because the plan was very costly and employers wanted participants to work as long as possible so that the employers could get their money's worth.[1] That testimony makes clear that the employer trustees and the union trustees approved the Amendments for different and conflicting reasons.

Employer trustees favored the regulations as a means of keeping participants working on their vessels for a long time. They did not like the idea of bearing the burden of financing a pension plan where employees with 20 years of pension service credit could retire, receive pension benefits, and then go to work for a competing employer in the industry. The union wanted to keep younger licensed deck officers content with their MM&P affiliation. Therefore they pressured the older officers to retire with these provisions. Given the wage related formula for computing pension benefits, the threat to assign older officers lower paying second and third mate jobs was tantamount to a threat to reduce their pensions. Thus they had to choose between retiring and securing a greater pension benefit or continuing to work faced with both a loss of pay and status and also a reduced pension. Amendment 47 was intended to prevent older officers from escaping this Hobson's choice by taking non-MM&P jobs.

Defendants, to the court's surprise, presented no expert actuarial testimony that the penalty imposed in the two amendments was needed

or even that it in any way enhanced the financial integrity of the plan. There was no evidence that actuarial considerations were a factor in the trustees' decision to adopt these amendments. Finally, it is impossible to conclude that the financial integrity of the plan is protected by severely penalizing defectors from MM&P ranks, when the impact on the plan's financial well being of those retirees who work in forbidden employment other than on U.S. flag ocean going vessels not covered by MM&P agreement is so insignificant that a denial of benefits while they work and for six months thereafter suffices. There was, moreover, no testimony that the plan's actuaries had advised imposing the penalty or had approved it as needed to safeguard the plan. On the contrary, the amendments were of union origin, drafted by union counsel, and there is nothing in the record to show that the amendments benefited the plan or its participants.

I conclude, as did the court in *Deak v. Masters, Mates and Pilots Pension Program*, No. 79-190 *slip. op.* at 15 (M.D. Fla. June 4, 1984), "Trustees drew a distinction between certain types of re-employment in the industry primarily to protect MM&P by discouraging members who were eligible for their pension from accepting any job which benefited a competing union."

This penalty imposed on Chambless pursuant to Amendment 47 has not been justified, and is at best the product of the trustees' uninformed analysis. *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S.Ct. 67 (1983); *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978).

While the trustees may clearly impose regulations requiring full retirement before they are obligated to award pension benefits, they cannot extract the harsh penalty they imposed on Chambless in this case. The regulation pursuant to which the penalty was imposed is not in the interest of the plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund. Accordingly, the action of the trustees was arbitrary and capricious. Moreover, while Chambless could be denied pension benefits while he was still going to sea, he was not adequately informed of the harsh penalty that would be inflicted by his working for a rival union. His inquiry in his undated response to Maher's letter of July 19, 1977 makes clear that he thought he would be denied a pension only during the period he worked.

The action forfeiting his pension until age 65 is declared a nullity. The trustees are ordered to approve Chambless' application for a pension provided he ceases working in the maritime industry and certifies that he has done so and applies for a pension within six months of the date of this decision. If he so applies the trustees are to treat the application as if it had been made in 1977 and grant him a wage related pension based on his 1967-1977 employment record.

IT IS SO ORDERED.

Dated: New York, New York
August 2, 1984

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

---

1 Captain Lowen, Union President, on being deposed by plaintiff's counsel before trial, stated that he did not recollect the August 24, 1976 meeting of the trustees – the date Amendments 46 and 47 were adopted. (Lowen Dep. PP 194). He did not recall Bernard Epstein's review of the definition of retirement with the Joint Committee of Trustees at the August, 1976 meeting and did not recall what amendments Epstein had prepared. He did recall Amendments 46 and 47 from just having seen them. *Id.* 196-197. He did not recall having discussed the Amendments with Epstein before the meeting and had only a vague recollection of the meeting when the Amendments were discussed. *Id.* 198.

Nonetheless, at trial on questioning by counsel for the plan Lowen launched into a long and extensive dissertation on the reasoning behind the amendments and the need to protect the integrity of the fund. It is clear that at the pretrial deposition Lowen deliberately frustrated plaintiff's right to discovery. Accordingly, his testimony concerning the basis for these amendments is striken and will not be considered by the court. F.R.Civ.P. 37.

JUDGMENT DATED OCTOBER 29, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
80 Civ. 4258 (RLC)

Filed October 29, 1984

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

JUDGMENT

This action having been tried by the Court, Hon. Robert L. Carter, District Judge, presiding, on November 16 through November 23, 1983, and the Court having duly made and filed findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, it is,

ORDERED AND ADJUDGED that

(a) the action forfeiting Arthur Chambless' pension rights until he attains age 65 is declared a nullity;

(b) the trustees approve Arthur Chambless' application for a pension provided he ceases working in the maritime industry, certifies that he has done so and applies for a pension within six months of the date of this Court's judgment (October 29, 1984) and that if he does so, the trustees will treat the application, for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record;

(c) all other claims and causes of action asserted on behalf of plaintiffs are dismissed; and

(d) the Court retains jurisdiction of the parties and of this cause for the purpose of enforcing the judgment and making such further orders as are necessary.

Dated: October 29, 1984
New York, New York

/s/ Robert L. Carter
U.S.D.J.

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 10-30-84

ENDORSEMENT ORDER DATED NOVEMBER 30, 1984

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.

80 Civ. 4258 (RLC)

ENDORSEMENT

The motion is denied. Filing a motion to raise the kinds of questions brought up in the motion papers is simply a waste of time. All Captain Chambless is required to do is to certify to the plan administrator that he has withdrawn from all active employment in the maritime industry and wants to obtain his pension benefits. The form of the application is not important, and if the regular form is used, it is clear that there would be no need for him to answer questions that do not apply to his situation.

The apparent concern about the six month grace running out is groundless. If an appeal is taken, the six month grace is tolled. Under a narrow interpretation, the time would commence to run again after the Court of Appeals has rendered decision and issued its mandate to the district court. Under a more liberal interpretation, Captain Chambless would have six months from the date of the mandate of the Court of Appeals. This is all, of course, on the assumption that plaintiff prevails on appeal.

Under the court's judgment, Captain Chambless is entitled to receive in 1985 the wage related benefits he would have been entitled to receive in 1977. If 1977 pensioners similarly situated to Captain Chambless have received cost of living increments which increase their monthly benefits beyond the 1977 level, it may well be that Captain Chambless might be entitled to a monthly stipend with cost of living increments to bring him on par with other 1977 pensioners. It will be time enough to study that issue, if necessary, on remand. My opinion did not contemplate pension benefits for Captain Chambless retroactive to

1977. Mr. Garfield's approach was not considered. If this matter is appealed, plaintiff would be advised to raise those questions on appeal. Indeed, it would probably be prudent on plaintiff's part to cross-appeal, since a notice of appeal has been filed by defendant, in order to be certain that this matter is considered by the Court of Appeals. The issue of the cost of living increments does not appear to the court to necessitate a cross-appeal, but, again, prudence would dictate that the matter be presented to the court in brief and argument upon appeal.

Further, the court's advice would be for Captain Chambless to await the conclusion of the appellate process before applying for benefits. The attorney's fee issue should also be deferred until the case is again in this court on remand.

Finally, since this matter is now on appeal, it is suggested that the parties devote their time, effort and energy to the appeal. Whatever matters the court has to determine can await remand of this case to this court.

IT IS SO ORDERED.

Dated: New York, New York
November 30, 1984

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

SUMMARY JUDGMENT OPINION, SEPTEMBER 14, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 4258 (RLC)

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Plaintiffs,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

OPINION

CARTER, District Judge

I

In this action, Arthur M. Chambless ("plaintiff"), a veteran seaman, and his wife, Mildred H. Chambless, allege, *inter alia*, that his pension benefits have been improperly forfeited, that the trustees of his pension plan violated their fiduciary duties, and that his former union and former employers violated the antitrust laws by conspiring to deter him from working on vessels owned by competing shipping companies and represented by a rival union. Chambless and his wife seek restitution of the allegedly forfeited pension benefits, treble antitrust damages, and a clarification of their pension rights.

Chambless, a licensed deck officer, began sailing as a member of the International Organization of Masters, Mates & Pilots ("MM&P") on October 27, 1944. Chambless Aff. ¶2; Maher Aff. ¶4. Often serving as chief mate, Chambless continued working on vessels represented by the MM&P until December, 1976, when he submitted

his first application to the M.M.&P. Pension Plan ("the pension plan" or "the plan"). Complaint ¶2; Chambless Aff. ¶¶16-17; Maher Aff. ¶5.

The plan is a multiemployer pension plan that was established by an Agreement and Declaration of Trust dated August 1, 1955, in order to provide pension benefits to licensed deck officers working for companies that have collective bargaining agreements with the MM&P. Maher Aff. ¶¶2-3. The plan is funded solely by employer contributions and is administered by an equal number of employer and union designated trustees. *Id.* ¶2.

Chambless withdrew this pension application, however, because his "love for the sea" continued to beckon. Complaint ¶18; Exh. 4 to Maher Aff. He maintains that he submitted his initial pension application only after what he terms illicit union pressures compelled him to consider retiring. Complaint ¶17.

First, Chambless alleges that the MM&P maintains a policy of strongly encouraging – Chambless would say strong-arming – its older, more experienced members to retire so that the union can replace them with "new young blood" and thereby obtain more union dues. *Id.* ¶15; Chambless Aff. ¶¶6-7. He maintains that the union wrongfully assigned senior positions to officers more junior than he, failed to pursue his grievances on these matters, and, beginning in 1976, offered him less prestigious, lower paying work as a first, second, or even third mate. Chambless Aff. ¶¶4-6, 10-11. Chambless asserts that being assigned to work as a third mate was of "great humiliation for a licensed deck officer of my years of experience" and says that such assignments caused him to consider retiring. *Id.* ¶11.

Second, Chambless maintains that the union sought to usher him into retirement because he "knew too much" about, *inter alia*, favoritism and discrimination in work assignments and grievance processing, self-dealing by union officials with local funds, improper recordkeeping, and efforts to harass and intimidate certain employees into retiring. Complaint ¶14. Both the union and the plan deny Chambless' allegations about favoritism, discrimination, intimidation, and pressures placed on older members. Answer of MM&P ¶¶14-16; Answer of Pension Plan ¶¶15-16.

In early 1977, disgruntled with the low-level, low-paying assignments that the MM&P hiring hall had given him, Chambles took a two-

week assignment as master on an oil-drilling rig that did not have a contract with the MM&P. Chambless Aff. ¶12. He said that he did this only after he had asked a union agent at the hiring hall whether it would be all right for him to take such a job and only after the union agent told him that the union would have no objection. *Id.*; Complaint ¶21. When Chambless returned to shore after his fortnight on the rig, he was informed that because he had worked on a non-MM&P rig, he was no longer in good standing with the union. This was so, Chambless maintains, even though many other union members who worked on non-MM&P vessels were not so tarred. Chambless Aff. ¶13.

Disgruntled, Chambless then, to use his words, "retired from employment under the MM&P contract and filed [his second] application for pension benefits." *Id.* ¶14. At about the same time, Chambless accepted employment as a master on the Mount Explorer, an ocean-going vessel that was operated by a company that had a collective bargaining agreement with a rival union, the Marine Engineers Beneficial Association ("MEBA"). *Id.* ¶15. The two unions representing licensed deck officers – MM&P and MEBA – have been in intense competition for at least two decades, *see MM&P v. NLRB (Westchester Marine Shipping Co.)*, 539 F.2d 554, 556-57 (5th Cir. 1976), *cert. denied*, 434 U.S. 828 (1977), and the Mount Explorer on which Chambless sailed has been the focus of a picketing dispute and unfair labor practice lawsuit between the two labor organizations. *See MM&P v. NLRB (Cove Tankers Corp.)*, 575 F.2d 896 (D.C. Cir. 1978).

Chambless submitted his second pension application on or about April 2, 1977. Chambless Aff. ¶14; Maher Aff. ¶6; Exh. 5 to Maher Aff. Six days later, Stephen P. Maher, the administrator of the plan, wrote Chambless, as he had done after Chambless had submitted his first application, to acknowledge receipt of Chambless' application and to advise him of the plan's definition of retirement.[1] Maher Aff. ¶¶5-6; Exh. 6 to Maher Aff. On June 30, 1977, a plan employee wrote Chambless to inform him that the trustee would consider his application, and that his monthly benefits would be approximately $920 on a percentage basis and $570 on a flat basis.[2] Exh. 8 to Complaint.

On July 19, 1977, Maher wrote Chambless to inquire whether Chambless had, as was rumored, taken a job on a non-MM&P vessel.

Exh. 9 to Maher Aff. In November, 1977, the plan received a letter from Chambless acknowledging that he had taken such employment beginning April 4, 1977. Exh. 8 to Maher Aff.

At their November 30, 1977 meeting, the pension trustees considered Chambless' application, Maher Aff. ¶13, and on January 26, 1978, Maher wrote to Chambless to inform him that the plan's trustees had concluded that because he had not retired under the plan's definition of retirement, he was not eligible for a pension at the time. Exh. C to Complaint. Furthermore, Maher informed Chambless that the plan would not pay him any pension until he reached the age of 65, which the plan defines as "normal retirement age."[3] *Id.*; Article I, Section 13 of the plan regulations. Chambless will not turn 65 until December 7, 1986. Complaint ¶ 10. In a January 28, 1980 letter, Maher advised Chambless that the monthly pension benefits he is to receive upon turning 65 will likely be $470. Exh. C to Complaint.

In deciding that Chambless would not receive pension benefits until he turns 65, the trustees acted pursuant to Article II-A, Section 15(a)[4] and Amendments 46 and 47 to the plan regulations. The amendments were passed on August 26, 1976, and were encoded in Article II-A, Section 15(b) and Article II-A, Section 20.[5] Article II-A, Section 15(b) states in pertinent part:

> If a Pensioner works in covered employment forbidden by this Section,
>
> 1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age, as defined in Article I, Section 13; provided further, however, that if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean-going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P/PMA Pension Plan . . . , then the Pensioner shall not be entitled to pension benefits for any month of such employment nor for any months prior to such Pensioner reaching his Normal Retirement Age, as defined in Article I, Section 13.[6]

Echoing the above quoted provision, Article II-A Section 20 states in pertinent part:

> In the event a Participant subsequent to his accrual of credit for 10 years of vesting service and prior to his retirement, is employed in the capacity of a Licensed Deck Officer on a U.S. flag ocean-going vessel employed by a company which is not a Participant in the M.M.&P. Pension Plan or the MM&P/PMA Pension Plan . . . , such Participant shall not be entitled to any pension benefits prior to his reaching his Normal Retirement Age, as defined in Article I, Section 13.

Chambless appealed the trustees' rejection of his application and appeared with counsel at the December 5, 1979 trustees' meeting. Maher. Aff. ¶10. On March 5, 1980, the trustees again voted to deny Chambless' pension benefits until he turns 65. *Id.*

On June 24, 1980, Chambless brought this suit against the pension plan, Stephen Maher, the plan administrator, the MM&P, the plan's employer and union trustees,[7] the Maritime Services Committee and the American Maritime Association, employer organizations that do collective bargaining for shipping companies, and six shipping companies that formerly employed Chambless, have contracts with the MM&P and contribute to the MM&P plan: Amerada Hess Corporation, Amoco Shipping Company, Central Gulf Lines, Inc., National Transport Corporation, Wabash Transport, Inc., and Waterman Steamship Corporation.

Chambless had alleged several wide-ranging claims against these defendants, although it is often unclear which claims are directed against which defendants. The legal theories behind his claims are often obfuscated and occasionally overlapping, but the basic claim, and it appears in several different guises, is that the union and plan discriminated against him and caused his pension benefits to be suspended and forfeited because he went to work on a vessel operated by a competing company and represented by a rival union.

In his first cause of action, Chambless asserts that the defendants violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA" or "the Act"), by suspending payment of his vested pension after he went to work on a non-MM&P vessel.[8] Complaint ¶28. In a related, if somewhat overlapping claim, he asserts that even if a plan has the right to suspend pension payments when a retiree returns to work, it does not have the right to continue suspending those benefits after the plan participant goes back into

a retiree returns to work, it does not have the right to continue suspending those benefits after the plan participant goes back into retirement. In addition, Chambless says that the plan regulations are causing a forfeiture of his benefits by reducing them from an estimated $920 a month beginning at age 55 to an estimated $470 a month beginning at age 65. Chambless Aff. ¶25. The plan contends, however, that its regulations do not provide for any illegal forfeiture and that its trustees acted within the letter of the law in suspending Chambless' benefits until he turns age 65. Maher Aff. ¶11.

Chambless also contends that Amendments 46 and 47, by discriminating against plan participants who work on non-MM&P vessels, are "punitive in purpose and effect" and "arbitrary and capricious" and therefore violate the trustees' fiduciary duties. Complaint ¶¶28, 29, 33. He also argues that the age that the plan selected for normal retirement age is a "sham" that was chosen to make it easier for the plan and union to discriminate against disfavored members. *Id.* ¶28(a). Chambless accuses the defendants of further violating their fiduciary duties by passing regulations that allegedly are not for the sole benefit of plan participants and their beneficiaries, by failing to provide a full and fair review of his pension application, and by failing to provide him with certain information that he had requested. In a related claim, Chambless' fifth cause of action charges—evidently alluding to language in the plan documents which states that the trustees must act solely in the interest of the plan participants—that the defendants breached his contractual rights in violation of 29 U.S.C. § 185.[9] *Id.* ¶42.

In addition, Chambless maintains that at no time before he took employment on a non-MM&P vessel did the plan or union notify him of the import of newly enacted Amendments 46 and 47 for participants who take non-MM&P employment. Complaint ¶29; Chambless Aff. ¶¶29-31; Exh. 10 to Maher Aff.

The plan responds that all MM&P members were notified of the new rules through *The Master, Mate & Pilot*, the union newspaper, and that Chambless was specifically notified by letter. Maher Aff. ¶7; Exh. 8 to Maher Aff.

In his second cause of action, Chambless charges that defendants combined and conspired in restraint of trade by "interfer[ing] with the right of licensed deck officers to engage in their trade or profession."[10] *Id.* ¶35. He sees Amendments 46 and 47 as the chief instruments of these efforts. The plan and union deny that the purpose of

the disputed amendments was to restrain trade. Answer of MM&P ¶32; Answer of Pension Plan ¶32. Defendants say that the plan's regulations have always required that benefits be suspended when plan participants work in "prohibited" employment and argue that Amendments 46 and 47 aim to "preserve and enhance the corpus of the MM&P plan." Lowen Aff. ¶7.

Chambless' third cause of action alleges that defendants, because of the assurances they allegedly gave him about accepting employment on non-MM&P vessels "are estopped from denying" him benefits.[11] *Id.* ¶38. In his fourth cause of action, Chambless asserts that the MM&P has breached its duty of fair representation by discriminating against senior seamen like himself and by failing to pursue several of his grievances.[12] *Id.* ¶40. Defendants deny both the estoppel claim, Answer of Pension Plan ¶38, and the duty of fair representation claim. Answer of MM&P ¶40.

Plaintiff prays for the payment of his pension benefits retroactive to May 1, 1977, damages of $100 per day for the defendants' failure to furnish him with certain pension information, treble antitrust damages for alleged lost earnings and pension benefits, and a declaration that the defendants' acts are unlawful and null and void under the antitrust laws. Chambless also seeks punitive damages, costs, and attorneys' fees.

II

The pension plan, the plan trustees and Maher, the plan administrator, and MM&P move for summary judgment on the grounds that 1) the actions taken by the plan trustees are in accordance with the plan regulations and such regulations comply with ERISA and are not arbitrary or capricious or effectuated in bad faith; 2) plaintiff's claims for a declaration of the amount of benefits Chambless will receive at age 65 and a declaration of his wife's rights are not ripe for adjudication; 3) the plan cannot be estopped from acting on the basis of statements allegedly made by employees of the union; 4) the plan's regulations are exempt from antitrust scrutiny by virtue of the non-statutory labor exemption; 5) Chambless has not alleged that he has suffered any antitrust injury, and 6) Chambless received or had access to all the documents that ERISA requires the plan to supply.

The shipping companies and employers' associations have also moved for summary judgment, asserting that they are not fiduciaries of the

plan and cannot be held liable as such and that ERISA requires the plan administrator, not them, to supply certain information. As for the antitrust claims, they argue that they are protected by the non-statutory labor exemption and that plaintiff has suffered no antitrust injury.

Chambless has cross-moved to strike the affidavits of Maher, the plan administrator, and of Robert J. Lowen, the International President of the MM&P. Chambless asserts that the affidavits should be stricken because they contain assertions and legal conclusions about which the affiants allegedly have no personal knowledge.

III

LEGAL DETERMINATION

A

Ripeness of ERISA Claims – Defendants contend that Chambless' ERISA claims should be dismissed for lack of ripeness because Chambless has not alleged that he plans to retire in the immediate future and because he is merely seeking a declaratory judgment regarding what amount he will receive at age 65. Defendants maintain that even if the court were to conclude that there is a dispute over an issue of material fact regarding whether the plan has the right to continue suspending Chambless' benefits should he retire before age 65, that issue would not be ripe on the ground that there is no likelihood that Chambless will soon retire.

Similarly, defendants argue that Mrs. Chambless' claim is not ripe because she is seeking merely a declaration of her rights to survivor benefits should her husband die before age 65 – an eventuality that they assert is hypothetical and remote. In short, they contend that neither Chambless nor his wife suffers any present harm from the plan's regulations. Lastly, they argue that certain events may occur before Chambless turns 65 – changes in federal statutes or regulations or changes in the plan regulations or the trustees' interpretation of those regulations – and that these events may significantly alter the inquiry or render it moot.

Chambless responds that this suit does not seek a declaratory judgment, but instead seeks an order overturning certain plan regulations and awarding him benefits at once. He contends that the

plan trustees acted arbitrarily and capriciously in suspending his benefits, that the classifications in the regulations are illegal, and that the "normal retirement age" that the trustees selected, i.e., age 65, is a "sham."

In their ripeness arguments, both sides have distorted what Chambless' often unclear complaint says. What is clear, however, is that Chambless and his wife seek a declaration or clarification of their rights, assert that they suffer present harm due to the suspension of Chambless retirement benefits, and seek damages under ERISA for the defendants' alleged past wrongs.

The jurisdictional section of ERISA states:

> A civil action may be brought–
>
> (1) by a participant or beneficiary–(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or *to clarify his rights to future benefits under the terms of the plan*;
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) *to enjoin any act or practice which violates any provision of this subchapter* or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan. . . .

29 U.S.C. §1132(a) (emphasis added).

Here, the Chamblesses seek not only a clarification of their rights to future benefits but also to "enjoin" a "practice" that allegedly "violates" ERISA. 29 U.S.C. § 1132(a)(3).

The Seventh Circuit addressed many of the ripeness questions raised here in an ERISA case brought by a class of pension plan participants, none of whom had reached the age of 65 or had yet applied for a pension, for a declaration or clarification of their rights after the plan had raised the normal retirement age from 57 to 65. In words that might have been written for the case at bar, the Seventh Circuit stated:

> We reject the trustees' contention that this is a "battle of hypotheticals, a classic example of the difficulty of deciding a case concerning a complex technical subject without the benefit of

> specific facts.". . .[Plaintiff] seeks a determination of the nature and scope of the Plan participants' rights to future benefits. Section 1132 provides that a civil action may be brought "by a participant to clarify his rights to future benefits under the terms of the plan. . . ." 29 U.S.C. § 1132. *This action is precisely the type of action contemplated by the statute.*

Janowski v. International Brotherhood of Teamsters, 673 F.2d 931, 935 (7th Cir. 1982) (emphasis added), *vacated on other grounds and remanded for reconsideration of attorneys' fees*, 51 U.S.L.W. 3937 (June 28, 1983).

Chambless' suit to find out whether the plan has the right to suspend his benefits when he took non-MM&P employment and whether he has a right to obtain benefits before age 65 should he retire before that age "is precisely the type of action contemplated by the statute." *Id.* The same is true regarding Mrs. Chambless' effort to obtain a clarification of what her rights are should her husband die before the age of 65.

In arguing that the claims of Chambless and his wife are not ripe, defendants rely on two pre-ERISA cases. In *Lugo v. Employees Retirement Fund*, 529 F.2d 251 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976), plaintiff challenged a pension plan rule that denied benefits to participants who did not work a total of 90 months during the ten years before they applied for a pension. Lugo was 53 at the time he brought suit, and under the pension plan rules could not recieve benefits until he turned 60. The court concluded that Lugo's lawsuit was not ripe since Lugo had to wait seven yars before becoming eligible for a pension, because it was very possible that he would accumulate 90 months of work in his last ten years, and because he did not allege "present objective harm" or the "threat of specific future harm" as a result of the challenged rule. *Id.* at 258, *quoting Lecci v. Cahn*, 493 F.2d 826, 829 (2d Cir. 1974). The court wrote, however, that had Lugo attacked the validity of the rule requiring that participants be at least age 60 to obtain benefits and had he asserted that he was thus presently entitled to a pension, he would have stated a ripe claim. *Id.* at 257-58.

The instant case is distinguishable from *Lugo* on several grounds. First, whereas Lugo did not attack the age 60 rule and assert that he deserved a pension *at the present time, id.*, Chambless attacks the age 65 normal retirement age of the MM&P plan as illegal, a sham,

and an improper bar to his receiving benefits *at the present time.* Second, the *Lugo* court deemed it wise to hold off adjudicating on the merits because ERISA was soon to take effect and "the impact of ERISA prior to the time Lugo reaches age 60 will undoubtedly be considerable." *Id.* at 259. That reason for not addressing the merits is absent here. Third, while Lugo brought his case under § 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), Chambless has brought his case under ERISA, which in its language allowing plan participants and beneficiaries to sue for a clarification of their rights has liberalized ripeness requirements. *See Janowski, supra,* 673 F.2d at 935.

Defendants also rely on *Stewart v. M.M.&P. Pension Plan,* 608 F.2d 776 (9th Cir. 1979), which, like Lugo, was brought under the LMRA, rather than ERISA. Stewart challenged a plan regulation that did not give additional years of pension credit to plan participants who, after having accumlated 20 years of pension credit and after having retired, went back to work. His lawsuit was a declaratory judgment action. *Id.* at 782. Stating that the plaintiff was not "in fact subjected to or imminently threatened with substantial injury," *id,* at 783, and that the plaintiff "did not aver that he wanted to retire or would retire," *id.* at 784, the court held that Stewart's action was not ripe.

The instant case is distinguishable from *Stewart* in several ways. *Stewart* was not brought under ERISA and therefore ERISA's more generous ripeness criteria regarding the clarification of rights were not in effect. Second, while the plaintiff in *Stewart* did not aver that he was suffering present harm, Chambless has alleged that because his pension has been suspended he is suffering present harm from the rules that he is challenging.

For the above reasons, the ERISA claims brought by Chambless and his wife are ripe for adjudication.

B

The Validity of Amendments 46 and 47 under Section 203 and the Federal Regulations—Amendments 46 and 47 provide that a plan participant who leaves retirement and goes to work on *an MM&P vessel* is to have his pension benefits suspended for the time he is working plus six additional months after he ends his re-employment. These amendments also provide that participants who leave retirement to

work *on non-MM&P boats* are to have their pension benefits suspended until they reach normal retirement age—which is 65 under the plan—even if they re-retire well before age 65. (Indeed, under these amendments, any participant with more than ten years' experience who goes to work on a non-MM&P boat is not to receive any benefits until he turns 65.) ERISA requires that participants receive their pension benefits once they reach normal retirement age, so long as they do not continue working in the same industry, trade, and geographical area. 29 U.S.C. § 1053(a)(3)(B)(ii).[13]

Although the gravamen of Chambless' claims here is not pellucid, he appears to claim that the plan's refusal to pay him benefits until he reaches age 65, pursuant to Amendments 46 and 47, is a suspension proscribed by section 203(a) of ERISA, 29 U.S.C. § 1053(a), and by the regulations that the Department of Labor ("DOL") has issued under ERISA. Chambless argues that under section 203(a) and 29 C.F.R. § 2530.203-3(b)(2) (1982),[14] a plan may suspend a retiree's benefits only during the period he is re-employed and then only if the re-employment is in the same industry, trade and geographical area. Chambless maintains that the plan's suspension of his benefits is illegal, first, on the ground that he is not working in the same geographical area and, second, on the ground that should he re-retire before turning 65, the suspension would continue beyond the period of his re-employment.

The plan counters, however, that section 203(a) of ERISA, 29 U.S.C. § 1053(a), "does not restrict in any way" the suspension of a plan participant's benefits before he reaches normal retirement age and that because Chambless has not reached that age, the plan trustees are free to suspend his benefits.

Inasmuch as Chambless misconstrues both section 203(a), 29 U.S.C. § 1053(a), and the DOL regulations, his attack on Amendments 46 and 47 will find no support in either of these sources.

Section 203(a) reads in pertinent part: "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable *upon the attainment of normal retirement age*. . . ." (emphasis added). This court has stated previously that "[t]he Act, on its face, requires only that pension benefits be nonforfeitable upon attainment of normal retirement age, in this case, age sixty-five. The Act, therefore, gives plaintiff no vested right to receive benefits until

he reaches that age." *Riley v. MEBA Pension Trust*, 452 F. Supp. 117, 120 (S.D.N.Y.) (MacMahon, J.), *aff'd*, 586 F.2d 968 (2d Cir. 1978). Because Chambless has not reached age 65, the benefits that the plan is suspending are not normal retirement benefits, but are instead *early* retirement benefits. The Second Circuit has noted, moreover, albeit in dictum, that "Congress did not intend for early retirement supplements to be unforfeitable." *Riley v. MEBA Pension Trust, supra*, 586 F.2d at 970 n.2, *quoting Capocci v. General Motors Corp.*, 444 F. Supp. 1306 (D. Hawaii 1978); *see also Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1253-54 (9th Cir. 1981) ("*Hurn I*") ("The critical inquiry is whether Hurn had reached "normal retirement age", for if he had not, section 1053(a) would not protect him from the suspension of benefits he suffered"); *Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617, 620 (9th Cir. 1981) ("ERISA gives an employee-participant no vested right to *receive* pension benefits until he reaches normal retirement age. . . . Congress never intended to impose upon a plan a requirement that any benefits be payable before age 65") (emphasis in original).

The case law thus makes clear that section 203(a) provides no protection against the suspension of benefits of plan participants, such as Chambless, who have not yet reached normal retirement age.[15] The DOL regulations support this position in stating that "[a] plan may provide for the suspension of pension benefits which commence *prior to the attainment of normal retirement age*. . . ." 29 C.F.R. § 2530.203-3(a)(1982)(emphasis added). Therefore, as long as the plan begins paying him benefits upon his attainment of normal retirement age, Chambless has no claim under section 203(a) or the DOL regulations.[16]

C

Amendments 46 and 47 and Their Alleged Arbitrary, Capricious, and Discriminatory Nature—Chambless next maintains that Amendments 46 and 47 must fall under another section of ERISA, the section setting forth the fiduciary duties of plan trustees. 29 U.S.C. § 1101 *et seq.* He argues that the amendments are arbitrary and capricious, discriminatory, and in bad faith and that the trustees violated their fiduciary responsibilities in enacting such regulations.[17]

Chambless contends that the two amendments establish an invidious discrimination by suspending the benefits of retiree-participants who

return to work on non-MM&P vessels for far longer than those of participants who return to work on MM&P boats.[18] Complaint ¶28(d). According to Chambless, in passing the amendments, the plan's trustees violated their fiduciary duties because the amendments, he argues, were not enacted "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), but instead primarily to help the MM&P and shipping companies that have contracts with the MM&P in their struggle against rival companies and unions. Chambless argues that the main purpose of the amendments was to deter MM&P members from working on vessels that had contracts with MEBA, that is, as yet another weapon in the MM&P's war against its rival union. Complaint ¶¶15, 28; Chambless Aff. ¶¶18-20.

To bolster his allegation that the amendments were passed for discriminatory reasons and not in the interest of the plan's participants, plaintiff has submitted an affidavit quoting the deposition of Charles Hemming, a former MM&P vice president, who stated that "the thrust [for Amendments 46 and 47] was from the union side" and that the idea of the amendments was to make it difficult for new shipping companies to find workers. Opsahl Aff. ¶12. He said that the plan trustees knew that "these new companies. . .would have a need for skilled licensed deck officers," and that "the only source. . .available would be members of the MM&P." *Id.* Hemming stated:

> The hoped effects of this amendment would be to deny the experienced personnel to operate these newer ships that were coming off because so much of an efficient ship operation depends upon the master's judgment, and he can make or break a company.
>
> * * * *
>
> Q. So the purpose in effect was to keep these experienced masters away from the companies that most needed them; is that correct?
>
> A. That was my understanding of it, yes.

A notice that was published numerous times in the union's official newspaper unwittingly adds some weight to Chambless' argument that the amendments had a discriminatory aim. That notice, including its telling title, reads in relevant part:

> STAY ON COURSE. . .

> Sailing Non-MM&P Contract Ships Jeopardizes Pension & Benefits
>
> Should you be offered an opportunity to accept employment aboard a non-MM&P contracted vessel, be sure you realize what you are doing, insofar as your Health & Benefit and Pension benefits are concerned.
>
> * * * *
>
> You accrue pension credits as a result of sailing aboard MM&P contracted vessels participating in the Pension Plan. Do not jeopardize your ultimate *pension* benefits by accepting employment aboard non-MM&P contracted vessels.

Exh. 7 to Maher Aff. (emphasis in original).

Defendants of course differ with Chambless about the reasons behind the disputed amendments. MM&P President Lowen asserts that they were passed "to preserve and enhance the corpus of the MM&P Pension Plan," to "[s]trengthen the base of the MM&P Pension Plan." Lowen Aff. ¶7, *quoting* Lowen Dep. at 127-30. He said the amendments would protect the corpus of the fund by "keeping available to our companies the people who are sailing under them . . . . If you're sailing under the MM&P Pension Plan, and contributions are being made on your behalf, you're preserving the trust." *Id.*

While Lowen asserts that Amendments 46 and 47 were needed to ensure that there were enough workers for the vessels of contributing employers in the event of a labor shortage, *id.*, Chambless retorts that this is a mere pretext because in his view there has long been a surplus of qualified workers – evidenced by the competition between the experienced seamen and the "new young blood" – to fill the spots of contributing employers. Chambless Aff. ¶33. Chambless argues that because this is so, the trustees could have adopted the amendments only to prevent competing employers from obtaining the qualified employees they need.

Section 404 of ERISA, 29 U.S.C. § 1104, sets forth the fiduciary duties of a plan trustee:

> (a)(1) . . . a fiduciary shall discharge his duties with respect to a plan *solely in the interest of the participants and beneficiaries* and –

(A) *for the exclusive purpose of:*

(i) *providing benefits to participants* and their beneficiaries;

and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * *

(D) *in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of this subchapter.

(emphasis added).

Several courts have held that pension fiduciaries may breach their duties not only by violating these specific provisions, but also by acting "arbitrarily and capriciously." In *Riley v. MEBA Pension Trust*, 570 F.2d 406, 413 (2d Cir. 1977) ("*Riley I*"), a seminal ERISA case, Judge Friendly wrote:

> It has been suggested that after January 1, 1975 [the date ERISA's fiduciary provisions took effect], new federal standards of fairness must apply with respect to charges of breach fiduciary duty not explicity covered by Part 4 of ERISA . . . . We have no difficulty with th[is] argument . . . . but *we know of no federal standard that would here be applicable other than the arbitrary or capricious one already discussed, see Morgan [v. Laborers Pension Trust Fund]*, 443 F. Supp. [518], 524 [(N.D. Cal. 1977)]; *cf. Rehmar v. Smith*, 555 F.2d 1362, 1371 (9 Cir. 1976)

(emphasis added).

In the latter case cited by Judge Friendly, the Ninth Circuit wrote that decisions of pension trustees "may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Rehmar v. Smith*, *supra*, 555 F.2d at 1362. This language is almost identical to that which the

Second Circuit used in a pre-ERISA case assessing whether pension trustees had violated their fiduciary duties under section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).[19] *See Beam v. MM&P*, 511 F.2d 975, 980 (2d Cir. 1975).[20] Thus the court concludes that the "arbitrary and capricious" standard is the proper level of review to apply here.[21]

Chambless' argument that Amendments 46 and 47 violate ERISA's fiduciary duties on the ground that they were not adopted "solely in the interest of the [plan's] participants and beneficiaries," 29 U.S.C. § 1104(a)(1), draws support form *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559, 566 (N.D. Ohio 1978). That case explores ERISA's fiduciary obligations in great depth and states that the "lead line of section 1104(a)(1) imposes a separate and overall requirement upon the trustees to discharge all of their duties 'solely in the interest of the participants and beneficiaries'–Congress thereby added a responsibility over and above the prohibition against self-dealing."

In addition, Chambless argues that the amendments also violate 29 U.S.C. §1104(a)(1)(D) by failing to be "in accordance with the documents and instruments governing the plan." The "Powers and Duties" section of the Agreement and Declaration Trust establishing the plan states that the trustees "shall discharge their duties *solely in the interest* of those entitled to benefits hereunder." Article V, Section (1)(b) of Agreement and Declaration of Trust, Exh. 1 to Maher Aff. (emphasis added). *Cf. Winpisinger v. Aurora Corp., supra*, 456 F. Supp. at 567. Chambless makes a similar claim in his fifth cause of action, which alleges that "Defendants have breached the contractual rights to pension benefits as provided under the plaintiff's contract of employment in violation of 29 U.S.C. § 185." Complaint ¶42. In this cause of action, Chambless is evidently referring to the plan's Agreement and Declaration of Trust and the "solely in the interest" language quoted above.[22]

The court of course recognizes that "[a]ctuarial considerations and the long-term health of the plan are valid concerns of the trustees[,]" *Kozlesky v. Board of Trustees for Amalgamated Department Store Retirement Income Plan*, 546 F. Supp. 466, 468 (E.D. Mich. 1982), and that these considerations may have been a factor in the passage of Amendments 46 and 47. Nevertheless, plaintiff has carried his burden of showing that there is a dispute over the material issue of

whether Amendments 46 and 47 were adopted to maintain the fund's financial integrity or for other, less laudable motives that might be inconsistent with the trustees' fiduciary obligations. Chambless has also offered "concrete particulars," *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d. Cir. 1978), such as the Hemming deposition, to establish that there are additional disputes over whether the trustees, in adopting the amendments, acted "solely in the interest of the participants and beneficiaries," acted arbitrarily and capriciously, or acted with improper discriminatory or bad faith motives.[23] Thus, summary judgment is denied on these issues.

D

Selection of 65 as Normal Retirement Age – Chambless next argues that the plan's establishing 65 as the normal retirement age is a "sham." Complaint ¶28(a). He asserts that 65 is not the normal retirement age because more than 90 percent of the participants retire before 65. Noonan Aff. ¶16; Noonan Reply Aff. ¶6. Chambless asserts that the selection of 65 was arbitrary and capricious and that retirement has "normally been based upon years of service rather than the attainment of any chronological age." Noonan Aff. ¶16. Although Chambless is less than clear in his argument here, he seems to be saying that the plan adopted 65 as its normal retirement age so as somehow to deter licensed deck officers from working for competing companies and unions and to make it easier for the plan to penalize participants who take jobs on non-MM&P vessels. Chambless Aff. ¶28.

The plan maintains that its adoption of age 65 as the normal retirement age was in good faith and was done pursuant to the recommendation of its actuarial consultant.[24] Exh. 15 to Maher Aff. at 16. As further evidence that selecting 65 as the normal retirement age was not a "sham," the plan notes that in 1980 the average age at which plan participants retired was 62.7. Maher Reply Aff. ¶3. Defendants maintain that the mere two-year difference between 62.7 and 65 negates any inference that the new normal retirement age was adopted to penalize "bad boys" who accept employment on competing vessels.

The relevant language of ERISA defines "normal retirement age as the earlier of–

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of–

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24).

In mounting his attack against age 65 as the normal retirement age, Chambless relies less on statutory language, legislative history or precedent than on a dictionary definition of "normal" ("conforming to a usual or typical pattern," *American Heritage Dictionary* (1976)). While we are reluctant to parse through the many dictionary definitions of "normal," there is no need to turn to the dictionary here because the statutory language is clear.

The leading case on the question of normal retirement age, one rather similar to the the instant case, holds that ERISA presents no bar–except in the case of arbitrary and capricious or bad faith actions–to the decision of a pension plan to raise its normal retirement age to 65. In *Janowski v. International Brotherhood of Teamsters, supra*, plaintiffs contended that their pension plan's decision to change the normal retirement age from 57 to 65 improperly deprived them of the right to receive their vested benefits at age 57. Rejecting their arguments, the Seventh Circuit held that 26 U.S.C. § 411(a)(8), which is the analog in the Internal Revenue Code of 29 U.S.C. § 1002(24) and contains the identical definition of normal retirement age, "authorized any normal retirement age subject to the limitations of 65 years or 10 years of service." 673 F.2d at 937. The *Janowski* court found that the trustees, acting as fiduciaries when they raised the normal retirement age, did not act improperly in "balanc[ing] desired benefits against economic realities." *Id.* In other words, the court held that increasing the normal retirement age was acceptable when its bona fide purpose was to preserve the corpus of the pension fund.

The Seventh Circuit rejected the plaintiffs' argument that ERISA "mandate[d] that the normal retirement age remain the same in the [post-ERISA] Plan as it was in the [pre-ERISA] Plan." *Id.* at 936. The court concluded that "the trustees certainly could have established a normal retirement age of less than 65; the statutory language, however, in no way requires them to do so." *Id.* at 937. In explaining its decision, the court added:

> the required amendments were costly and Congress wisely committed [to the plan trustees] the task of balancing eligibility standards and benefit levels against the ability of the plans to pay. We agree that 65 was permissibly chosen as the normal retirement age.

Id. The Supreme Court specifically denied certiorari on this issue. ____ U.S. ____, 103 S.Ct. 130 (1982).

From the affidavit of Maher, the plan administrator, and from the report and recommendations submitted by the Martin E. Segal Company, an actuarial consultant to the plan, Exh. 15 to Maher Aff., it appears that the plan adopted age 65 as its normal retirement age to "promot[e] the financial integrity" of the plan. *Janowski, supra*, 673 F.2d at 937. Plaintiff has offered only "conclusory allegations," *SEC v. Research Automation Corp., supra*, 585 F.2d at 33, that the trustees' selection of 65 was a sham, was not in good faith, or was taken for reasons other than to maintain the financial integrity of the plan. Chambless has failed to present any evidence shedding light on how the amendment raising the normal retirement age, inasmuch as it was passed a year before Amendments 46 and 47, was enacted with the intention of operating in conjunction with those two amendments to punish participants who went to work on non-MM&P boats. "Concrete particulars" and not "conclusory allegations" are needed to oppose a motion for summary judgment. *Id.* at 33.

Chambless' challenge to the plan's adoption of 65 as the normal retirement age must be rejected, and summary judgment is granted the defendants on this issue.[25]

E

Reduction of Chambless' Anticipated Benefits—Chambless asserts that as a result of his work on a non-MM&P vessel, his pension benefits will be reduced from an estimated $920 a month to an estimated $470 a month and that the plan regulations therefore illegally cause his benefits to be forfeited. Again, Chambless has failed to specify exactly which provision of ERISA this reduction violates, but he is apparently arguing that this alleged forfeiture violates § 203(a) of ERISA, 29 U.S.C. § 1053(a). In addition, Chambless charges that in allowing his expected benefits to be reduced in such a manner, the plan trustees have violated their fiduciary duties.

On May 21, 1976, Jack Murray, a pension plan supervisor, sent Chambless a letter stating that he had accumulated thirty-one and one-quarter years of pension credits and that this "will entitle you to a monthly benefit of approximately $920.00." Exh. A to Complaint. On June 30, 1977, Murray again wrote Chambless, informing him that "on a flat rate basis you are entitled to $570.00 per month,"[26] and that "your percentage benefit. . .will be in the area of $900.00 to $920.00." Exh. B to Complaint.

After Chambless' application for early retirement benefits was rejected and after plaintiff took work on a non-MM&P vessel, Maher, in a letter dated January 28, 1980, notified Chambless' lawyer:

> At the present time, based on employment through 1977, Capt. Chambless has 32¼ years of pension credit. Under the Rules in effect at the time he applied for a pension, the maximum credit a Member could receive was 30 years of pension credit, which would provide a monthly benefit of $470.00, or 60% of his "pay," whichever is higher.
>
> Assuming he does not accrue additional pension credit under the M.M.&P. Pension Plan, he will be entitled, commencing as of January 1, 1987 [the date on which he would start receiving benefits after he turns 65], to a monthly payment of $470.00
>
> We arrive at the $470.00 per month in the following manner. The Wage-Related Pension, as you know, is calculated by using "pay" in the ten years preceding the effective date of the Member's pension. This would mean the ten years ending December 31, 1986, or 1977 through 1986. On the assumption described above, i.e., that Capt. Chambless does not engage in further covered [, i.e., MM&P,] employment thorugh the date of January 1, 1987, there would be no "pay" in the measuring ten-year period. The "flat" $470.00 monthly amount would thus be higher than the Wage-Related calculation and consequently such $470.00 per month would be the pension benefit payable.

Exh. C to Complaint.

Chambless contends that this anticipated decrease in benefits is an illegal forfeiture. He notes that before working on a non-MM&P vessel, he was entitled to a $920-a-month early retirement benefit from age 55, but that after taking such work, he will likely be entitled to only

$470 a month from age 65. Chambless' actuarial expert found that this had resulted in a decline of more than $125,000 in the actuarial value of his pension account. Garfield Aff. ¶9.

Although it is unclear which specific plan regulations Chambless is attacking here, it appears that his target is that section of the regulations which sets forth the rule on which Maher relied in his letter quoted above. Under Article II-A, Section 3 of the plan regulations, a participant with thirty years of credit is to receive monthly pension benefits of "$470 or 60% of pay, whichever is higher." In Article II-A, Section 3(ii), the plan regulations go on to define "pay" as the "average base monthly wages of the employee during the period of any 5 consecutive years within the last 10 years immediately preceding the effective date of the pension, which will produce the highest average for the Employee."

Chambless has failed to make any showing that he had a vested right in a $920-a-month pension, and for that reason, the court, with the record before it, does not find that the anticipated reduction in benefits contravenes the nonforfeitability provisions of § 203(a) of ERISA, 29 U.S.C. § 1053(a). Nor has Chambless made any showing that the prospective $470-a-month pension falls below a statutory minimum set by ERISA. Chambless has made more of a showing, however, that Article II-A, Section 3 of the plan regulations, in conjunction with other plan provisions, has an arbitrary, capricious and invidiously discriminatory effect upon him and thus violates the trustees' fiduciary duties.

At first glance, Article II-A, Section 3 appears neutral and nondiscriminatory; however, this case raises some serious questions about its potential to be used in a discriminatory manner. As discussed above, Chambless has made some showing that certain provisions of the plan may improperly discriminate against participants who work on non-MM&P boats and may not be in the sole interest of plan participants, *supra*, at 22-29, and this has caused the court to question why Article II-A, Section 3 uses as its base years—and the exact language is important—"the last 10 years immediately preceding the effective date of the pension," rather than a more logical and more pro-participant base such as "the last ten years in covered employment."

Article II-A, Section 3 is apparently fair to participants who apply for benefits right after retiring and intend to spend the rest of their

lives in retirement. The provision also seems fair to participants who retire from covered employment, apply for a pension, and take work in a different industry inasmuch as these individuals can still receive a pension and still have their ten most recent – and likely most highly paid – years of covered employment counted. The only participants whom this provision would injure are those who retire from MM&P work and then take work on a non-MM&P vessel because then, pursuant to this provision in conjunction with Amendments 46 and 47, they cannot receive benefits until they turn 65 and will not have these years in noncovered employment counted as base earning years. Instead, these years count as zero. This likely means that instead of having their benefits based on the more generous percentage basis, they will be based on the lower flat basis.[27]

Thus it is patent that Article II-A, Section 3, in conjunction with Amendments 46 and 47, not only will deter participants from taking non-MM&P employment, but also will likely punish them by reducing their benefits if they work on non-MM&P vessels. Notwithstanding Chambless' attacks on this provision, defendants have failed to come forward with any bona fide rationale for this provision, which has such great punitive potential.

This provision's ability to punish is even greater in light of the fact that under the pension regulations, a participant who works even one day on a non-MM&P vessel is not allowed to work again on an MM&P vessel unless and until he receives "express" permission from the plan. Article II-A, Section 16 of the plan regulations. Thus, if Chambless wanted to return to MM&P employment to accumulate some new base years from which his pension would be calculated, it appears that he might not even be given permission to return to MM&P employment, pursuant to Article II-A, Section 16 of the regulations, because he apparently is a disfavored employee. What is more, if what Chambless alleges is true – that the union unintentionally assigned him to inferior junior positions, refused to pursue his seniority claims, and in effect forced him to take a less humiliating job on a non-MM&P vessel – then the punitive, discriminatory potential of Article II-A, Section 3 becomes all the more glaring.[28]

In light of the defendants' failure to offer a good faith explanation for this challenged provision and viewing the record in the light most favorable to the party opposing the motion for summary judgment,

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970), the court finds that there is a dispute over the material issue of whether the regulations that cause Chambless' prospective pension payments to be reduced by almost 50 percent are arbitrary and capricious and improperly and purposely punitive and discriminatory.[29] Accordingly, summary judgment is denied, and this disputed issue will have to await resolution at trial.

F

Estoppel and Representations of a Union Agent—Chambless next maintains that because of alleged representations that a union hiring hall representative made to him, the pension plan sould be estopped—notwithstanding his employment on non-MM&P vessels—from suspending his early retirement benefits.

According to Chambless, about the time that the union was assigning him inferior positions on MM&P vessels, he asked George Clark, a union representative who served as dispatcher at the hiring hall in Mobile, Alabama, about he idea of his taking employment on a non-MM&P vessel. Chambless alleges that "Clark encourged me to accept such employment. He advised me that there would be no objection from the MM&P, and that many MM&P members, while drawing pension benefits, were so employed." Chambless Aff. ¶12; *see also* Complaint ¶21. Chambless maintains that he acted in reliance upon Clark's advice and took a job upon a non-MM&P oil rig, the Mission Viking, not knowing that this action would put him in bad standing with the union and, together with his taking non-MM&P employment on the Mount Explorer, result in his not being allowed to collect pension benefits until he turns 65 and in the plan's cutting his prospective pension benefits by almost 50 percent. Complaint ¶¶21, 23.

Chambless argues that the union and the pension plan are so "commingled" that is was reasonable for him to rely on the purported green light that Clark gave him. As an example of such commingling, Chambless notes that union officials and union hiring halls carry out investigations, at the plan's bidding, into whether certain participants are engaged in prohibited employment that would cause the suspension of their benefits. Opsahl Aff. ¶¶6-8; Exh. C & D to Opsahl Aff. In addition, Chambless points out, the union screens some applicants regarding their pension eligibility, and union counsel serves as co-counsel for the pension plan. Opsahl Aff. ¶11.

The plan denies improper commingling and replies that Chambless "only claims to have inquired about the Union rules, not the Pension Plan's rules." Plan's Memorandum in Support of Motion for Summary Judgment at 33. In its memorandum of law, the plan excerpts some telling portions of Chambless' deposition:

So I told him, I says, *"How does the union look on that?"*

"Oh, Arthur," he [George Clark] says, "lots of our members does that." . . . "Don't worry about it." . . . "You go right ahead if you want to go out there and work. . . . "

He says, "We have no objections whatsoever."

Id., *quoting* Chambless Dep. at 821 (emphasis added by plan). The plan points out, however, that Chambless never sought advice from anyone in the union or at the plan regarding his subsequent employment on other non-MM&P vessels, including the Mount Explorer. *Id.* at 34, *quoting* Chambless Dep. at 415-16.

The plan's memorandum cites another illuminating segment of plaintiff's deposition:

> Q. When you spoke to Mr. Clark before you went on the Mission Viking, did you say anything to Mr. Clark about your plans for retiring?
>
> A. No. *I didn't discuss anything with Mr. Clark in my plans to retire. . . .*
>
> Q. So you didn't ask him whether sailing on the Mission Viking would violate any rules of the pension plan; is that right?
>
> A. I think I told you that Mr. Clark assured me that it was all right for me to go out and go to work on the Mission Viking. . . *and I didn't go into any discussion.*

Id. at 34-35, *quoting* Chambless Dep. at 842 (emphasis added).

The principle of estoppel is that the "representation of fact made to a party who relies thereon with the right to so rely may not be denied by the party making the representation if such denial would result in injury or damage to the relying party." 1 S. Williston, *Williston on Contracts* § 139, at 601-02 (3d ed. 1957). *See also Rosen v. Hotel & Restaurant Employees Union*, 637 F.2d 592, 597 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981). The reliance of a party like Chambless

seeking to invoke the estoppel doctrine must be reasonable, however. *Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973).

In this context, the Second Circuit has written, "[c]ourts have been reluctant to apply the estoppel doctrine to require the payment of pension funds." *Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care Funds*, 624 F.2d 1132, 1139 (2d Cir. 1980). The principal reason for such reticence is that "[t]he actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan." *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976), *quoted in Haeberle, supra*, 624 F.2d at 1139. *Cf. Rosen, supra*, 637 F.2d at 598. If such funds are too vital to allow plan trustees to obligate the fund through their representations, *a fortiori* union officials—who are not as clearly identified with pension funds as are trustees—should not be permitted to commit the funds to persons not entitled to them. *Chamberlin v. Bakery & Confectionary Union Pension Fund*, 99 LRRM 3176, 3179-80 (N.D. Cal. 1977).

The main issue here is whether Chambless' reliance on Clark's representations was reasonable.

The case law is instructive. In an analogous case involving a plaintiff's relying on a union business agent's representation that he was eligible for a pension, the court wrote that "it would plainly be unreasonable to rely on a promise made by a person having no authority to commit the Fund." *Chamberlin, supra*, 99 LRRM at 3178. The court added: "the principle of removal of administration from union control is. . . fundamental to the" pension plan. *Id.* at 3179. In another case where a participant relied on a union official's representation that he qualified for a pension, *Yglesias v. United Paperworkers Pension Fund*, 2 Emp. Ben. Cases 1851, 1852 (E.D.N.Y. 1981), Judge Nickerson wrote: "It is too plain to require discussion that Yglesias may not base a claim on the statements of the Brotherhood's president." It would seem that if this is true for "the statements of the Brotherhood's president," it is all the more true for those of a mere hiring hall dispatcher like George Clark.

Article IV, Section 1 of the Agreement and Declaration of Trust of the MM&P pension plan, like Section 302(c)(5)(B) of the LMRA,

29 U.S.C. § 186(c)(5)(B), makes crystal clear that only the trustees – and not the union – are authorized to obligate the plan. Although there is, as one would expect, a close relationship between the union and the plan in the instant case, the court concludes that it was simply unreasonable for someone with more than 32 years of experience to rely with regard to the future of his pension benefits on a vague, informal snippet of conversation with a mere hiring hall dispatcher, when that conversation did not even discuss the effect of Chambless' taking non-MM&P employment on his pension and when that dispatcher had no authority to bind the plan.

What the *Chamberlin* court wrote is on point here:

> To permit . . . a single oral statement by a union business agent to obligate the trust to provide benefits to persons not otherwise entitled to them would seriously erode the requirement that the fund be administered by representatives of both the employer and the employees solely for the benefit of the employees of the contributing employer. 29 U.S.C. § 186(c)(5). Any such erosion can create a loophole that would enable the unscrupulous to divert funds away from the proper parties. . . .

99 LRRM at 3180. *See also Knoll v. Phoenix Steel Corp., supra,* 465 F.2d at 1132 ("The district court felt that even if such a statement had been made, it would have been unreasonable for the employees to have relied upon it, since the authority to determine the use of the Pension Fund rested solely with the Retirement Board. . . . Again, we agree").[30]

While it is recognized that such rules may have a harsh effect on some unsophisticated, unsuspecting pension plan participants, it is clearly wise policy to reject invocations of the estoppel doctrine, except in extraordinary circumstances. *See Haeberle, supra,* 624 F.2d at 1139. Such an approach will help preserve the corpus of the pension fund from improper obligations made by loose-lipped plan administrators, company officials, and union agents and will encourage plan participants to direct their pension questions to the responsible parties. *See Thurber v. Western Conference of Teamsters Pension Plan,* 542 F.2d 1106, 1109 (9th Cir. 1976) ("The fact that Thurber relied on representations of an employee of the firm retained to administer the trust fund would not estop the Pension Fund and its trustees from denying Thurber's eligibility for the pension. The rights of other

pensioners must be considered and the trust fund may not be deflated because of the misrepresentation or misconduct of the Administrator of the fund").[31] Summary judgment is granted on this issue.

G

The Plan's Alleged Failure to Notify Chambless about Amendments 46 and 47 Before Plaintiff Accepted Non-MM&P Employment– Chambless maintains that the plan failed to inform him of the far-reaching changes contained in Amendments 46 and 47 before he accepted work on a non-MM&P vessel. Complaint ¶29. He is arguing that the court should not allow the plan to enforce the punitive provisions of these amendments against him because he allegedly learned of them only after he took non-MM&P work.

Amendments 46 and 47 were adopted on August 26, 1976. Exh. 7 to Maher Aff.; Exh. E to Opsahl Aff. The amendments did not specify when they took effect, but it appears as if they became effective at passage. The October, 1976 edition of the *Master, Mate & Pilot*, the union newspaper, carried an article about the changes wrought by Amendments 46 and 47; it was written by plan administrator Maher and was headlined, "Retirement Defined: Important Changes." Exh. 7 to Maher Aff. The article, which ran on page 7, was accompanied by the text of the amendments. *Id.* Similarly, in its December, 1976 issue, the *Master, Mate & Pilot* ran a long article on page 13 in which Maher explained, *inter alia*, the import of the two new provisions. The article's headline was "Pensioners Are Still Prohibited From Working in Maritime Industry." *Id.*

Chambless acknowledges that he took steady employment on the Mount Explorer on April 4, 1977. Exh. 8 to Maher Aff.; Chambless Aff. ¶15. Although the exact dates are not clear from the record, Chambless apparently worked a two-week stint on a non-MM&P oil rig shortly before he took work on the Mount Explorer. Chambless Aff. ¶14. Chambless said he learned of the import of Amendments 46 and 47 "only after having made my [pension] application"–he was probably talking about his April 2, 1977 application–Chambless Aff. ¶29. He also stated that he "did not become aware of. . .the effects of Amendments 42, 46 and 47 until receipt of a letter dated March 13, 1978, from the Administrator[.]" Plaintiffs' Statement Pursuant to Local Rule 3(g) at 10. Although the exact date on which Chambless

finally learned about these amendments is unclear, whichever date it was apparently came after he started working on a non-MM&P vessel.

Certainly it would be an arbitrary and capricious action and a breach of fiduciary duty for fund trustees to penalize participants for taking actions contrary to newly adopted eligibility requirements without first providing them with adequate notice of the new provisions.[32] Fiduciaries of a fund cannot punish participants pursuant to a new rule unless they first take responsible steps to notify them of the new rule.

The plan asserts that the two newspaper articles provided Chambless with adequate notice of the amendments, but Chambless contends that he learned of the amendments only after he took actions that the amendments condemned. It is not clear to the court that Chambless would have ever seen the Maher articles if he were at sea when the October and December, 1976 editions of the MM&P newspaper were published. If he had seen the articles early enough, perhaps he would not have accepted non-MM&P work.

The plan has failed to present any evidence regarding how widely circulated the newspaper is and how likely it was that Chambless would have seen it. Thus, viewing the record in the light most favorable to the party opposing the motion for summary judgment, *Adickes v. S.H. Kress & Co.*, *supra*, 398 U.S. at 157, the court concludes that there is a dispute over the material issue of whether the union took reasonable steps to ensure that Chambless was notified about Amendments 46 and 47 before he took work punishable under those amendments. Accordingly, summary judgment is denied.

H

The Plan's Refusal to Comply with Chambless' Request for Information – Chambless next maintains that defendant Maher is liable to him, pursuant to § 502(c) of ERISA, 29 U.S.C. § 1132(c), to the amount of $100 per day since April 26, 1978, for the plan's failure to supply Chambless with certain information that he requested. Complaint ¶¶23, 31.

In a lengthy correspondence with Maher, Chambless requested many documents, and the plan furnished him with much of what he sought. On March 6, 1978, Chambless' previous counsel, Edward Thompson, requested a copy of the plan's regulations, Exh. 18 to Maher Aff.,

and on March 19, 1978, the plan sent him the regulations. Exh. 19 to Maher Aff. On March 22, 1978, Chambless' attorney requested all plan records "which involve applications. . .by other members whose circumstances are or were. . .similar to the instant matter." Exh. 20 to Maher Aff. On April 26, 1978, counsel for the plan wrote Chambless' lawyer that the plan had only one other case in which a participant had his pension suspended until normal retirement age for taking work on a non-MM&P vessel. Exh. 21 to Maher Aff. Plan counsel advised Chambless' attorney that "such records are not made available to anyone other than the particular member himself or his duly authorized representative." *Id.* With regard to the request of Chambless' counsel for the papers in any past or present litigation over similar questions, Exh. 20 to Maher Aff., lawyers for the plan responded that such a request is "beyond the scope of any documentation that the Plan is required to furnish and would be an undue burden upon the Plan." Exh. 21 to Maher Aff.

After an almost yearlong gap in correspondence between Chambless' lawyers and the plan, Arthur Wisehart, Chambless' current counsel, wrote the plan on April 12, 1979, to notify it that he was handling plaintiff's appeal of the denial of his pension application. Exh. 22 to Maher Aff. On April 23, 1979, Chambless' counsel requested that he be allowed "to examine prior decisions of the Board of Trustees regarding claims under the pension plan." Exh. 23 to Maher Aff. Five days later, Maher wrote Chambless' attorney that "it would be premature. . .to make Plan records available to you pertaining to prior decisions. . . .Your request involves reviewing 24 years of Pension Minutes." Exh. 24 to Maher Aff.

On June 1, 1979, Chambless' attorney requested copies of two collective bargaining agreements and the collective bargaining history of the changes in the pension plan regarding normal and early retirement age. Exh. 27 to Maher Aff. On June 22, 1979, Maher sent copies of the two collective bargaining agreements to Chambless' counsel and stated that he did not have the information requested on the collective bargaining history because the plan does not participate in such bargaining. Exh. 28 to Maher Aff.

Chambless' attorney wrote a letter on July 11, 1979, reiterating his desire to review all the trustees' decisions and asking for a copy of the plan's Agreement and Declaration of Trust, a list of amendments

to the plan, and a copy of a third collective bargaining agreement. Exh. 29 to Maher Aff. Twenty days later, Maher wrote that he would provide copies of the Declaration of Trust, the amendments to it, and the third collective bargaining agreement. Exh. 30 to Maher Aff. In addition, Maher wrote that plan counsel had advised him that a participant's attorney is not entitled to access to any and all determinations by the plan trustees. *Id.*

On August 4, 1979, Chambless' lawyer wrote Maher to say that he had not received "the information needed to prepare adequately" his appeal to the trustees—he was evidently referring to the records of past cases—and that he reserved "all rights as to the request for other information, which was not supplied." Exh. M to Opsahl Aff. At Chambless' appeal before the plan trustees on December 5, 1979, his attorney renewed his demand to see information on past rulings in similar cases. Tr. of Appeal Hearing at 15-17, Exh. F to Complaint.

ERISA contains numerous provisions that specify what documents and information a plan must provide participants. The plan must furnish each participant with a summary plan description containing such information as the names and addresses of the administrator and trustees, the eligibility requirements, and the circumstances that may result in loss of benefits. 29 U.S.C. §§ 1021(a)(1), 1022(b); 29 C.F.R. 2520.104b-2 (1982); *see Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 454 (1982). The plan administrator must also furnish to each participant a copy of the plan's annual report, which is basically a report on the plan's financial status. 29 U.S.C. §§ 1023, 1024(b)(3); 29 C.F.R. § 2520.104b-10 (1982). ERISA also requires plan administrators to furnish information on total benefits accrued to all participants who request such information. 29 U.S.C. § 1025(a). The plan must also make available for inspection the latest annual report, collective bargaining agreement and trust agreement. 29 U.S.C. § 1024(b)(2). Finally, the Act provides for the assessment of a penalty, at the discretion of the court, against "[a]ny administrator who fails or refuses to comply with a request for any information which such administrator *is required* by this subchapter to furnish to a participant or a beneficiary. . . ." 29 U.S.C. § 1132(c) (emphasis added). *See Paris v. Profit Sharing Plan*, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981); *Nugent v. Jesuit High School*, 625 F.2d 1285, 1285-86 (5th Cir. 1980); *LeFebre v. Westinghouse Electric Corp.*, 549 F. Supp. 1021, 1028 (D. Md. 1982).

The plan contends that it "fully complied with each request for documents made by Chambless or his counsel," Pension Plan Defendants' Statement Pursuant to Local Rule 3(g) ¶21, while Chambless maintains that the plan "did not fully comply with its duty to supply information." Plaintiffs' Statement Pursuant to Local Rule 3(g) at 10. Here, the plan is clearly mistaken in stating that it "fully complied" with Chambless' requests for documents; however, fortunately for the plan it has misstated the issue. The issue is not whether the plan furnished Chambless with all the information that he requested, but instead whether it provided him with all the documents that ERISA requires it to furnish.

The flood of correspondence between Chambless and the plan indicates that the plan turned over everything or gave Chambless access to everything that it was required to under ERISA. The Act states:

> The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator. . . .

29 U.S.C. § 1024(b)(2). The plan furnished Chambless with the Declaration of Trust, three collective bargaining agreements, the amendments to the plan, the plan's rules and regulations, and information about Chambless' prospective benefits.

Neither ERISA nor the federal regulations issued thereunder make any mention of any requirement that plan participants be allowed to see the minutes of trustees' meetings or prior decisions by the trustees. Nor has Chambless furnished the court with even one case supporting his position here.

The language of ERISA makes clear that Congress was concerned that requests for pension plan information not be too taxing on plan officials and not be too costly to the plan itself. *See, e.g.*, 29 U.S.C. § 1024(b)(4). In addition, Maher's concern that Chambless' request for complete access to information about all past denials might invade the privacy of some participants is a legitimate concern. Exh. 21 to Maher Aff. What is more, the fact that the court gave Chambless access to some of these materials during the discovery phase of this lawsuit

certainly does not mean that the trustees were required to turn over that information in the first instance. The "relevance" standard of Rule 401, F.R.Evid., is far more generous to the participant seeking information than are the specific standards that Congress set forth in ERISA.

Because Congress, in spelling out in exacting detail what information plans must make available to participants, did not require plans to provide the information that the plan refused to furnish to Chambless, the plan defendants' motion for summary judgment is granted with respect to Chambless' demand for a $100-a-day penalty for their refusal to comply with all of his information requests.[33]

I

Adequacy of the Plan's Review of Chambless' Application – Chambless charges that the plan failed to provide him with a "full and fair review" of his application in violation of § 503 of ERISA, 29 U.S.C. § 1133. Complaint ¶31. He asserts that the review was unfair on three grounds: that he was denied access to certain information that he wanted to use to prepare his appeal, Tr. of Appeal Hearing at 15-16, Exh. F to Complaint, that he was not allowed to ask certain questions at his March 5, 1980 appeal hearing before the trustees, *id.* at 8-10, 18, and that the trustees were biased against him. Complaint ¶31.

Section 503 of ERISA, 29 U.S.C § 1133 states:

In accordance with regulations of the Secretary, every employee benefit plan shall –

> (1) provide adequate notice in writing to any participant [of any denial], and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary on the decision denying the claim.

The regulations that the Secretary issued pursuant to this section reiterate the need for adequate notice, 29 C.F.R. § 2560.503-1(e) (1982), a "reasonable opportunity to appeal a denied claim," 29 C.F.R. § 2560.503-1(g)(1), and a "full and fair review of the claim and its denial." *Id.* The regulations add that

> [e]very such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;
(ii) Review pertinent documents; and
(iii) Submit issues and documents in writing.

Id.

As discussed *supra*, the plan did not refuse to furnish Chambless' counsel with any material that ERISA requires be made available. Because Chambless' attorney was allowed to "[r]eview [those] pertinent documents," *id.*, that he requested and that the plan was required by law to turn over, the court cannot conclude that Chambless was denied a full and fair hearing on the ground that he did not receive all the information that he had sought.

During the trustees' meeting, Chambless' lawyer sought to interrogate two trustees, but the chairman of the meeting would not let him question the trustees at that time. The meeting chairman stated that the purpose of the hearing was for Chambless' counsel to "present the facts" and for the trustees to ask questions, if they had any. Tr. of Appeal Hearing at 6, 11, Exh. F to Complaint. In addition, in refusing to allow Chambless' attorney to interrogate trustees at the hearing, the chairman stated, "we will give you the opportunity to submit questions in writing. . .and we will give you the opportunity to present a further appeal at a future Trustees' meeting." *Id.* at 10. Later, he reiterated that "you can pose any questions that you like, and. . .they will be answered in writing." *Id.* at 17. From the January 28, 1980 letter of Maher to Chambless' counsel, it is clear that the plan did respond in writing to several of the questions that plaintiff's lawyer had asked at the hearing. Exh. C to Complaint. That the chairman of the hearing stated that the trustees would respond to the questions of Chambless' lawyer in writing rather than orally at the meeting is certainly not reason to find that the hearing was unfair.

Lastly, Chambless stated that he "was told on December 4, 1979, the evening before the hearing, that the Trustees had already made up their minds." Complaint ¶31. Chambless, however, has offered only "conclusory allegations," rather than "concrete particulars," about the trustees' alleged bias. At no time during the hearing did any trustee exhibit any of the specific bias that Chambless alleges. Indeed, considering the frequent testiness and contentiousness of Chambless' counsel, the trustees seemed downright patient during the 90-minute hearing. They heard Chambless' lawyer make a full presentation on a range

of issues – alleged breaches of the union's duty of fair representation, Tr. of Appeal Hearing at 20-24, Exh. F to Complaint, estoppel, *id.* at 29, the discrimination and intimidation that Chambless allegedly faced, *id.* at 22-24, and the argument that the plan's normal retirement age was a "sham", *id.* at 32.

For all these reasons, Chambless' arguments that the hearing was neither full, nor fair must be rejected, and the defendant's motion for summary judgment must be granted on this issue.

J

Antitrust Claims – Chambless alleges that the MM&P and several shipping companies that have collective bargaining agreements with the MM&P have combined and conspired in restraint of trade by interfering with the ability of licensed deck officers to engage in their trade. Complaint ¶¶34-36. In short, Chambless asserts that Amendments 46 and 47, along with several accompanying regulations and actions, restrain the mobility of many MM&P members and thus violate sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2.

Although Amendments 46 and 47 appear to have anticompetitive aims, Chambless has failed to make crystal clear exactly what the antitrust injury is that he is suffering. He seems to say that the injury is the alleged shrinkage of the actuarial value of his pension account. He apparently is not suffering from lost earnings because his salary now is evidently higher than before.

It is difficult to see how the injury that Chambless alleges "is *antitrust* injury, that is to say, injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). In his efforts to find a legal theory about which relief for his client's grievance could be granted, Chambless' counsel adopted the blunderbluss or fishing expedition approach – putting every colorable theory into his complaint. "[P]laintiff has attempted to assert an antitrust claim when [his] true grievance is grounded in" ERISA and duty of fair representation law. *Laurie Visual Etudes, Inc. v. Chesebrough-Pond's, Inc.*, 473 F. Supp. 951, 960 (S.D.N.Y. 1979) (Weinfeld, J.). In another context, Judge Friendly has written: "Combining an assertion of general antitrust violation with a claim of injury from breach of contract or tort does not automatically make the latter a claim arising under the antitrust

laws." *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). Similarly, trying to graft a purported antitrust injury onto a claim of injury from a violation of ERISA "does not automatically make the latter a claim arising under the antitrust laws." *Id.* Because the injury that Chambless alleges is not the species of injury that the antitrust laws aim to protect, defendants' motion for summary judgment is granted as to Chambless' antitrust cause of action.[34]

K

Duty of Fair Representation—In his fourth cause of action, Chambless claims that the MM&P breached its duty of fair representation, but he does not specify exactly how the union violated that duty. Complaint ¶¶39-40.

A fair reading of Chambless' complaint leads to a conclusion that he is asserting a claim under both of the traditional types of fair representation claims. First, in charging that his union has systematically discriminated against older, more experienced employees in favor of new, young blood, *id.* ¶15, Chambless makes a claim somewhat analogous to the discrimination claim made in the landmark duty of fair representation case, *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). *See* Complaint ¶15; Chambless Aff. ¶¶6-7. Second, in asserting that he had incurred the hostility of certain union officials and that as a result they did not pursue his seniority grievance, Complaint ¶¶14-15; Chambless Aff. ¶4, or his overtime grievance, Complaint ¶16; Chambless Aff. ¶10, Chambless articulates a duty of fair representation claim similar to the type considered in *Vaca v. Sipes*, 386 U.S. 171 (1967). In that case, the Court stated that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191.

In its answer, the MM&P has disputed Chambless' duty of fair representation claim, Answer of MM&P ¶¶14-16, 39-40, and this dispute will have to be resolved at trial.

L

Plaintiffs' Cross-Motion to Strike Maher and Lowen Affidavits—Chambless has moved pursuant to Rule 56(e), F.R.Civ.P., to strike the affidavits of plan administrator Maher & MM&P President Lowen

in support of the defendants' motion for summary judgment. Chambless contends that the two affidavits contain assertions that are legal conclusions and about which the affiants had no personal knowledge. While Chambless is correct that both affidavits contain such statements, that is still not sufficient reason to strike them. Chambless can trust the court to ignore or refrain from using those parts of the two affidavits which are defective. At the same time, the court will use those parts of the affidavits where it is clear that the affiants have personal knowledge. Thus, Chambless' motion to strike the affidavits is denied.

Conclusion

To recapitulate, summary judgment is granted defendants on Chambless' antitrust claim[35] and on his claims that the suspension of his benefits violates section 203(a) of ERISA, that the age 65 normal retirement age is a "sham," that the plan is estopped from suspending Chambless' benefits, that his application failed to receive adequate review, and that the plan improperly withheld information from him.

The motion for summary judgment is denied, however, with respect to Chambless' claims that Amendments 46 and 47 and the anticipated reduction in his benefits are arbitrary, capricious, and discriminatory. Summary judgment is also denied on plaintiff's claim that the plan failed to notify him about the import of Amendments 46 and 47 before he took work on a non-MM&P vessel. The duty of fair representation claim also survives to be resolved at trial.

IT IS SO ORDERED.

Dated: New York, New York
September 14, 1983

/s/ Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

FOOTNOTES

1. Article II-A, Section 15(a) of the 1977 plan regulations states:

Retirement Defined

To be considered retired, a person must withdraw completely from any further employment, in any capacity, aboard any vessel whatsoever. As used in the foregoing sentence, the word "vessel" shall not include fishing vessels, yachts, dredges, oceanographic, or research vessels of 300 feet or less in length. Upon application by the pensioner, the Trustees may, in their sole discretion, authorize employment aboard other small craft, which the Trustees, in their sole discretion, consider similar type vessels. (Amendment No. 49 – Adopted March 2, 1977).

2. It appears that the plan employee who wrote the June 30, 1977 letter was mistaken in stating that Chambless would be entitled to $570 per month on a flat rate basis. Both a letter written by plan administrator Maher and Article II-A, Section 3 of the regulations state that the pension of a flat basis for a participant with 30 years of pension credit is $470.

3. Article I, Section 13 of the plan regulations states: " 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation." It was passed on December 29, 1975 as part of Amendment 42.

4. The text of Article II-A, Section 15(a) is quoted in note 1, *supra*.

5. These citations are to the 1977 MM&P Plan Regulations, Exh. O to Opsahl Aff., which were the regulations in effect when the events relevant to this action occurred. Many of the provisions and amendments relevant to this action have been renumbered and reamended as part of the 1980 MM&P Plan Regulations. Exh. 13 to Maher Aff.

6. The text of Article I, Section 13 is quoted in note 3, *supra*.

7. These trustees and alternate trustees are listed as defendants in this action: C.J. Bracco, Richard M. Casselberry, Michael DiPrisco, E. Gras, George Groh, Justin A. Gross, James Hammer, James J. Hayes, Martin F. Hickey, Charles Jess, F.E. Kyser, Charles Landry, Orion A. Larson, R.L. Lowen, Lloyd Martin, Eric May, David Merritt, Thomas E. Murphy, H.L. Nereaux, William V. Ott, M. Pecil, Franklin J. Riley, Jr., William I. Ristine, A.C. Scott, John Smith, R.J. Soriano, Ernest K. Swanson, Michael Swayne, Allen Taylor, Nicholas Telesmanic, Kenneth P. Wenthen, and C.E. Whitcomb. Complaint ¶6.

8. The court has jurisdiction of this ERISA cause of action under section 502(f) of ERISA, 29 U.S.C. § 1132(f).

9. The court has jurisdiction of the fifth cause of action under section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a).

10. The court has jurisdiction of this antitrust cause of action under 15 U.S.C. § 15.

11. Since this cause of action is in effect an ERISA claim, jurisdiction arises under 29 U.S.C. § 1132(f).

12. The court has jurisdiction of this cause of action under section 301(a) of the LMRA, 29 U.S.C. § 185(a).

13. Section 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B) states in pertinent part:

> A right to accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits–
>
> * * * *
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necesary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

14. Section 2530.203-3(b)2) of 29 C.F.R. (1982) states in pertinent part:

> If benefit payments have been suspended . . . payments shall resume no later than the first day of the third calendar month after the calendar month in which the employee ceases to be employed in section 203(a)(3)(B) service: *Provided*, That the employee has complied with any reasonable procedure adopted by the plan for notifying the plan that he has ceased such employment.

15. This holding with regard to section 203(a) is consistent with a letter that the defendants have submitted concerning Patrick L. Sullivan, a participant who challenged the plan's suspension of his early retirement benefits because he evidently had taken prohibited employment. Exh. 17 to Maher Aff. In the Sullivan letter, the DOL stated that the suspension of his early retirement benefits was not improper under section 203(a) because Sullivan had not yet reached normal retirement age. Urging the court to show "great deference to the interpretation given the statute by the officers or agency charged with its administration," *Udall v. Tallman*, 380 U.S. 1, 16 (1965), defendants argue that since the DOL upheld Amendments 46 and 47, so should the court uphold them–against not just plaintiff's challenge under section 203(a), but also against his challenge that they are arbitrary and capricious.

There is one flaw to this argument, however. In assessing the validity of Amendments 46 and 47 under section 203(a), the court has, of course, shown "great deference" to the finding of the DOL in the Sullivan letter. The problem with defendants' argument, however, is that the Sullivan letter failed to consider two of the key issues in this lawsuit–the discriminatory nature of Amendments 46 and 47 and the likely reduction from $920 to $470 in Chambless' retirement benefits. In other words, the

Sullivan letter was limited to one question—whether section 203(a) prohibits the suspension of early retirement benefits. It did not consider whether other aspects of Amendments 46 and 47 were arbitrary, capricious or discriminatory and therefore violated fiduciary duties.

16. Just as section 203(a) does not bar the plan from suspending Chambless' benefits before he reaches normal retirement age, nor would it bar the plan from refusing to pay his wife survivor benefits should Chambless die before reaching age 65.

17. If it is arbitrary, capricious and improperly discriminatory to suspend until age 65 the benefits of a retired participant who returns to work on a non-MM&P vessel, but suspend only for the duration of re-employment the benefits of a participant who returns to work on an MM&P vessel, then it would be arbitrary, capricious and improperly discriminatory to deny survivor benefits to the spouse of a participant who returns to work on a non-MM&P boat and dies before age 65, while allowing survivor benefits for the spouse of a participant who returns to work on an MM&P vessel and dies before age 65.

18. Chambless makes an additional, although vague argument that the trustees acted in a discriminatory matter. He maintains that the trustees have not suspended the pension benefits of "favored" employees who have gone to work on non-MM&P vessels and that therefore they acted in an arbitrary, capricious and discriminatory manner toward him when they suspended his pension for taking non-MM&P work. In making such an argument, Chambless has furnished the court with "conclusory allegations" only and not with any "concrete particulars." *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). For this reason, summary judgment is granted the defendants on this issue.

19. Section 302(c)(5), 29 U.S.C. § 186(c)(5), states that it is unlawful for any labor organization or any agent of any labor organization to demand or accept money from an employer, except as compensation, provided that this prohibition shall not be applicable

> with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents. . . .

The provision then sets forth a host of requirements for such trust funds.

20. In *Beam*, Judge Moore stated that the standard was "whether the Trustees' decision was arbitrary or capricious, the product of bad faith, and whether or not such decision was based on substantial evidence." 511 F.2d at 980.

21. Defendants argue that the court should not apply the "arbitrary and capricious" standard. They maintain instead that the court should not upset any of the plan's eligibility requirements unless the defects of the plan violate the standard set forth in *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). In that case,

which was brought under the LMRA rather than ERISA, the Supreme Court held that where pension eligibility provisions are the product of collective bargaining, rather than the work of trustees who are given plenary power to determine eligibility requirements, the plan's collectively bargained provisions and the trustees' implementation of those provisions "are entitled to the same respect as any other provision in a collective bargaining agreement," *id.* at 575, that is to say, they are immune from attack "[a]s long as such conditions do not violate federal law or policy." *Id.*

Amendments 46 and 47 were adopted in August, 1976. In April, 1977, Chambless submitted his pension application, which was rejected and from which this lawsuit springs. Ultimately, Amendments 46 and 47 "were incorporated in and became a part of the 1978 Collective Bargaining Agreement." Plan's Memorandum in Support of Motion for Summary Judgment at 16. Section XXIX, Subpart B of the 1978 Agreement states, in pertinent part:

> There shall continue in effect (a) the benefits and eligibility rules of the MM&P Pension Plan in effect under the Agreement as of June 15, 1978.

See id.

Even though Amendments 46 and 47 were ultimately incorporated in the collective bargaining agreement, there are several reasons why the "absent conflict with federal law or policy" standard of review that was articulated in *Robinson* is not applicable here.

First and foremost, the incidents relevant to this case occurred before the effective date of the 1978 collective bargaining agreement, which incorporated by reference Amendments 46 and 47.

Second, the amendments were effectively adopted by the trustees pursuant to the full authority granted them in the Agreement and Declaration of Trust, rather than by the union and employers through collective bargaining. In *Robinson*, the Supreme Court, distinguishing pension provisions adopted through give-and-take collective bargaining from those adopted by trustees who are given broad discretion to establish eligibility rules, stated, with apparent approval:

> The Court of Appeals has held . . :"that [where] the Trustees have 'full authority. . . .with respect to questions of eligibility'. . .the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards."

455 U.S. at 573, *quoting Pete v. UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 19[illegible]) (*en banc*). This would argue in favor of applying an "arbitrary and capricious" standard of review in the case *sub judice*.

Third, in *Robinson*, the Supreme Court noted that the district court had found that the disputed provisions were "the subject of explicit, informed and intense bargaining." 455 U.S. at 569. Here, the defendants have made no such showing. Indeed, it appears as if that part of the 1978 contract which incorporated Amendments 46 and 47 was merely *pro forma*. However, because the disputed amendments were not included in the collective bargaining agreements until after the acts relevant to this lawsuit occurred, we need not reach the question whether this type of *pro forma* incorporation of the provisions into a collective bargaining agreement—far different from "explicit, informed and intense bargaining"—would warrant the same deferential standard of

review that the Court established in *Robinson*. We doubt, however, that Amendments 46 and 47 would be entitled to such deference because of their *pro forma*, matter-of-fact incorporation in the collective bargaining agreement.

This view is supported by *Hurn v. Retirement Fund Trust*, 703 F.2d 386 (9th Cir. 1983), in which the defendants asserted that the challenged provisions were the product of collective bargaining and that the deferential *Robinson* standard should apply. Rejecting this argument, the Ninth Circuit stated that the disputed provisions were not the " 'subject of explicit, informed and intense bargaining.' " *Id.* at 389, *quoting Robinson*. The court added, in language that is applicable in this case:

> Nothing in the record suggests that the [challenged rule] was established in collective bargaining. The trustees enjoyed the initiative on changes in the Fund. The formulation and pre-drafting debate over all rules. . .was their responsibility. Rules did have to be ratified by union and employer representatives before they could be adopted by the trustees. Independent approval by representatives of each side, however, is not the equivalent of collective bargaining. *Robinson*, therefore is inapplicable." *Id.*

Lastly, even if the *Robinson* standard were applicable here, the amendments would still not be immune to attack, for they appear to conflict with federal laws and policies, for example, the policy barring labor organizations from restraining or coercing employees in exercising their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

22. In his complaint, Chambless also alleges that Amendments 46 and 47 and the suspension and reduction of his benefits are "void and ultra vires" because they are "inconsistent with. . .the plaintiff's contract of employment, and the Trustees lacked authority to derogate from those benefits." Complaint ¶30. This claim is almost identical to both his claim of a breach of fiduciary duty under 29 U.S.C. § 1104(a)(1)(D) and his fifth cause of action. Thus, there is no need to address Chambless' ultra vires claim separately.

23. Chambless makes a related argument that Amendments 46 and 47, along with other aspects of the plan, violate § 302(c)(5) of the LMRA, 29 U.S.C. § 186 (c)(5), on the ground that they contain "structural deficiencies." In blunderbuss fashion, Chambless contends that the plan regulations are not sufficiently detailed, that there is too much intermingling between the union and the plan, that Amendments 46 and 47 are arbitrary and capricious, and that all these things constitute structural deficiencies that the court should correct.

Many courts have held that they have jurisdiction to examine whether certain trust funds set up under the LMRA have structural deficiencies. *See, e.g., Burroughs v. Board of Trustees of Pension Trust Fund for Operating Engineers*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Johnson v. Botica*, 537 F.2d 930, 934 (7th Cir. 1976). One court has written that "[a] 'structural' defect is present when 'pension trustees, acting under the authority of the trust fund "arbitrarily and capriciously" den[y] pensions to employees.' " *Elser v. IAM National Pension Fund*, 684 F.2d 648, 652 (9th Cir. 1982), *quoting Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 541 (9th Cir. 1980).

The Second Circuit, however, "has not displayed enthusiasm for the notion that § 302 (c)(5) gave the federal courts a roving jurisdiction over. . .the structure of pension plans." *Riley I, supra*, 570 F.2d at 412; *see also Lugo v. Employees Retirement Fund, supra*, 529 F.2d at 254-55. In *Riley I*, Judge Friendly went on to say:

> It is not obvious from either the language of § 302(c) or from the legislative history why a plan is not "for the sole and exclusive benefit of the employees of such employer" simply because the agreed division of pension benefits strikes a court as unfair. . . . In any event, now that we have ERISA with its extensive provisions for fiduciary responsibility, Part 4, §§ 401-414, 29 U.S.C. §§ 1101-1114, and the direction implicit in § 514 (a), 29 U.S.C. § 1144(a), superseding state laws, for the federal courts to develop a federal common law with respect to plans covered by ERISA, there can be little justification for relying on § 302(c)(5) to accomplish the same goals.

570 F.2d at 412-13. On a similar note, Chief Judge Feinberg wrote in *Lugo*, referring to ERISA:

> The careful attention paid by Congress in that recently enacted statute to the problem of effective dates and coverage makes us hesitate to conclude that the courts have long been authorized via the fifth exception to a criminal statute, [i.e. § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5),] to create obligations similar to those of ERISA.

529 F.2d at 255 (footnote omitted).

In light of the Second Circuit's unenthusiastic attitude toward using § 302(c)(5) as a basis for patrolling pension plans and inasmuch as "[t]he actions of trustees are subject to the same standard of review under ERISA's fiduciary provisions as under the LMRA[,]" *Elser v. IAM National Pension Fund, supra*, 684 F.2d at 654; *Rosen v. Hotel & Restaurant Employees*, 637 F.2d 592, 596 n.5 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981); *accord Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433 438 (9th Cir. 1980); *Riley I, supra*, 570 F.2d at 413, there is no reason here for the court to examine the plan regulations under § 302 (e), 29 U.S.C. § 186(e). To paraphrase the court in *Morgan v. Laborers Pension Trust Fund*, 433 F. Supp. 518, 524 (N.D. Cal. 1977): "The applicability of the fiduciary requirements of [the LMRA] is of questionable importance since defendants concede that the court has jurisdiction over this case under [ERISA]. It appears that the same 'arbitrary and capricious' standard of review governs judicial supervision of trustees, regardless of the origin of their fiduciary duties."

Because it would be redundant to assess the validity of the plan regulations under § 302, after evaluating them under ERISA, the court declines Chambless' unnecessary invitation for it to rework under the LMRA the "arbitrary and capricious" analysis it has already done under ERISA.

24. In the section of its report and recommendations regarding normal retirement age, the actuarial consultant, the Martin E. Segal Company, wrote:

> It is important to have a clear statement in the Plan defining the normal retirement age. This will then be the age at which deferred vested benefits become payable. Also, the law seems to require a plan to grant a fully vested

> benefit to an employee who retires after he reaches the normal retirement date regardless of his benefit credits. Thus, your present eligibility test of 15 years of benefit credits for a reduced Pension will have to be dropped for an employee who works to retirement age. It may not even be permitted to reduce the 15 years to 10. We therefore suggest that you take advantage of a provision of the law which permits you to define normal retirement age as "the later of age 65 or the age on the tenth anniversary of the employee's participation in the plan." Even with such a definition, it will be possible for an employee to become a participant at, say, age 58 and because his employment is not steady, reach age 68 with less than 10 and perhaps only 5 years of service. The benefit will be small but at least the Fund will not find itself paying benefits based on a year or two, and in extreme cases, only a few months of service.

Exh. 15 to Maher Aff. at 16.

25. The two cases that plaintiff belatedly cites regarding the definition of normal retirement age are enlightening, but distinguishable. In *Johnson v. Franco*, No. 79-2262, slip op. (E.D. La. Dec. 21, 1981), the plan regulations incorporated the statutory definition of normal retirement age. Johnson had worked from 1946 to 1969 as a member of the National Maritime Union and under the plan regulations qualified for a "service pension." There was no set minimum age requirement under the plan for receiving a service pension, and service pensions apparently provided for full pension benefits. The court concluded that because he had qualified for what was a full pension under the plan, Johnson had reached normal retirement age, and as a result the plan could not suspend payment of his benefits when he went back to work in a different trade. *Cf. Hurn I, supra; Riley, supra.*

First, unlike in *Johnson*, in the instant case, the plan's regulations have a definition of normal retirement age that is neither open-ended nor ambiguous. Second, here, unlike in *Johnson*, the plan clearly distinguishes between early retirement benefits and normal retirement benefits. Third, in *Johnson*, there was no challenge that the plan's normal retirement age was a sham; the case focused instead on interpreting the plan's ambiguous definition of normal retirement age.

The issue in the second case that Chambless cites, *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan*, No. 79-0263, slip op. (D.D.C. Feb. 23, 1979), was similar to that in *Johnson*. In *Nichols*, the plan regulations did not expressly define what the normal retirement age was, but did state the requirements for obtaining a "Normal Pension:"

> An Employee shall be eligible to receive a Normal Pension if he retires after:
>
> a) he has been credited with twenty-five (25) years of credited service at any age, or
>
> b) he has attained the age of sixty-five (65) and has been credited with a minimum of five (5) years of credited service.

Id. at 1. The plaintiffs, who were under 65 and were credited with 25 years of service, brought suit after the plan suspended payment of their benefits for allegedly working in the same trade, industry and area. Having no clear-cut definition of normal retirement age to rely on, the court found that the plan participants who brought suit must

have reached normal retirement age because they had qualified for "normal pensions." The court wrote:

> [V]iewing the Plan as a whole, in conjunction with the purposes to be achieved by ERISA, it appears to the Court that defendants may not divest these plaintiffs of their vested pension rights by arguing that they have not reached their normal retirement age when their own plan considers them to be eligible for a normal pension.

Id. at 4.

Unlike in *Nichols*, in the case at bar, the plan explicitly defines normal retirement age. Moreover, unlike in *Nichols*, the MM&P plan has no full, fixed "normal pension;" instead one's pension apparently increases steadily as participants accumulate service credits.

26. *See* note 2, *supra*.

27. Drastically reducing a participant's anticipated normal retirement benefits because he left retirement to work on a non-MM&P vessel as his last job before retiring appears analogous to denying a coal miner his pension benefits altogether because his last job, even for one day, before retiring was with a company that did not contribute to his pension plan. The District of Columbia Circuit disapproved of this rule in *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970), and in *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

28. A rule such as this which causes a reduction in benefits to a participant who arguably was forced against his will to take non-MM&P work is analagous to the rule struck down in *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1971). In that case, the court found that the National Maritime Union Pension Trust acted arbitrarily and capriciously in denying benefits to a participant who had his 15 years of pension credits erased because he had undergone an involuntary break in service. He had wanted to work on an NMU vessel, but there was no work available. The court wrote that "the rule, to the extent that it prohibits benefits to an employee solely because of an involuntary interruption in employment after the completion of his minimum employment requirement and before reaching retirement age, is unreasonable on its face." *Id.* at 1312.

29. If the court finds that it is arbitrary and capricious for the plan to reduce Chambless' normal retirement benefits by almost half because he went to work on a non-MM&P boat, then similarly it would be arbitrary and capricious for the plan to reduce his wife's survivor benefits just because he went to work on a non-MM&P boat.

30. In his complaint, Chambless makes another estoppel claim. He alleges that "[b]y reason of. . .the malice and hostility toward the plaintiff, tantamount to the malicious discharge of plaintiff by the defendants, defendants have waived any objection to plaintiff's action in obtaining other employment, and are estopped from denying plaintiff [his] full [pension] benefits." Complaint ¶38. This is also a species of estoppel

claim, but it too must fail, for, as explained above, it would be improper to sap the corpus of the fund whenever there is a misdeed by a union official. Chambless' malicious discharge/estoppel claim is more properly seen as a duty of fair representation claim. *See discussion infra* at 60-61.

31. To buttress his estoppel argument, Chambless relies almost exclusively on *Carlsen v. MM&P Pension Plan Trust*, 80 N.J. 334, 403 A.2d 880 (1979). Finding that the union and pension plan were so commingled that certain union actions could estop the plan from refusing to pay the plaintiff retirement benefits, the New Jersey Supreme Court stated:

> The pension system was created by the union, union representatives serve as trustees of the pension fund, pension privileges are a union benefit, the union certifies eligibility for membership in the pension plan and both entities are benefited by the circumstance that the pension plan is funded entirely by employer contributions.

Id., 403 A.2d at 883. The Carlsen court found that the plan was estopped from denying a pension to the plaintiff after the union had told him that if he paid several thousand dollars in missed dues to reinstate himself in the union – he missed making such payments for several years when he was engaged in non-MM&P work – he would receive his pension. Carlsen paid the money, but was still denied a pension.

Chambless' reliance on *Carlsen* is misplaced for several reasons. First, *Carlsen* is a state law case, and pension plans are now an area controlled by federal substantive law, *Riley I*, *supra*, 570 F.2d at 512, *citing* 29 U.S.C. § 1144(a), and where "a federal statute determines rights and liabilities the federal common law. . . is controlling with respect to whether the defense of estoppel is available." *Thurber*, *supra*, 542 F.2d at 1109, *citing Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 196 (1942); *see also Chamberlin*, *supra*, 99 LRRM at 3178. *Carlsen* used local rules of estoppel, and "federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States." *Sola Electric Co. v. Jefferson Co.*, *supra*, 317 U.S. at 196.

Second, in *Carlsen* both the union *and* pension plan had acted in such a way as to estop the plan from refusing to pay Carlsen his pension. The court wrote that "defendant union and pension trust handled matters in a way which would lead plaintiff to believe that by paying a reinstatement fee and subsequent dues he would protect his pension rights." 403 A.2d at 883. Thus, because Carlsen's estoppel holding is based on actions by both union and pension trust, its finding that the fund was estopped because of actions by the union is arguably an alternative holding or dictum. In the instant case, Chambless does not accuse the pension plan of having taken any actions that warrant the invocation of estoppel.

Third, while in *Carlsen*, the union actions out of which Carlsen's estoppel claim grew were official union policies implemented by the leadership of the union, in the case at bar there was no action by the MM&P as an institution, but instead merely a solitary statement by a subaltern in the union hierarchy.

Lastly, Chambless, citing *Parkiane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), argues that *Carlsen* collaterally estops the plan from "disavow[ing] joint responsibility for

plaintiff's predicament," 403 A.2d at 883, because of the close relationship between the plan and union. We decline Chambless' invitation to use offensive collateral estoppel here because *Carlsen* was decided under state, rather than federal law, because its analysis of the alleged commingling between the plan and union seems inadequate, and because the specific actions in *Carlsen* which led to the invocation of the estoppel doctrine involved far more union-pension plan cooperation than did George Clark's alleged advice, which involved no pension plan participation whatsoever.

32. The Restatement of Trusts (Second) emphasizes the importance of a trustee's obligation to communicate material facts to beneficiaries. The Restatement stated that the trustee

> is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.

Restatement (Second) of Trusts § 173, Comment B (1959); *see also Rosen v. Hotel & Restaurant Employees Union, supra*, 637 F.2d at 599-600.

33. As part of his grabbag approach to litigation, plaintiff's lawyer has raised several other ERISA issues that are totally irrelevant to this lawsuit. One issue raised is that the trustees have violated their fiduciary duties by authorizing the union and its hiring halls to investigate whether plan participants are engaged in prohibited employment. Another issue raised, although it clearly does not apply to Chambless, is that the plan regulations require participants to belong to the union in order to apply for a pension. It goes without saying that under section 203(a), 29 U.S.C. 1053(a), such a restriction would be illegal if it prevented someone from receiving normal retirement benefits. In any case, neither of these two issues need be addressed by the court because neither is relevant to the case at bar.

34. Inasmuch as Chambless' second cause of action is dismissed because it fails to state an antitrust injury, the question whether the non-statutory labor exemption would have applied here had true antitrust injury been alleged need not be reached.

35. With the dismissal of Chambless' antitrust claims, the two employer organizations and the six shipping companies are dismissed as defendants. Because they are not plan fiduciaries, Chambless' ERISA claims do not apply to them. Section 402(a) of ERISA, 29 U.S.C. § 1102(a); Article IX, Section 1 of Agreement and Declaration of Trust; Article I, Section 7 of Plan Regulations.

FROM THE TRIAL TESTIMONY OF DR. RALPH GARFIELD, EXPERT WITNESS ON BEHALF OF THE PLAINTIFFS

THE WITNESS: As I understand the question is am I able to compute as of May 1, 1977 the present worth of a pension of $920 a month commencing at May 1, 1977 and payable for the remaining lifetime of a man born December 7, 1921.

THE COURT: By "present value", are you able to compute the value of that pension as of November 18, 1983?

THE WITNESS: The word "present" is confusing, I think, your Honor.

THE COURT: Tell me, are you talking about November 18, 1983?

THE WITNESS: Certainly one can compute it say as of December 1, 1983. November 18, 1983.

THE COURT: We are talking about a computation that you are going to make as of November 18 or December 1, is that right?

THE WITNESS: The question Mr. Wisehart was asking me, I think, was did I make a computation as of May 1, 1977. In other words, stopping the clock at that point in time and I did make such a computation.

THE COURT: That is all I wanted to know. So you are going to respond as of May 1, 1977.

THE WITNESS: Yes, sir.

THE COURT: Not as of November 18, 1983?

THE WITNESS: Yes, sir, but that second computation is fairly easily done.

THE COURT: I am just trying to understand what you are going to do.

Q. In fact, I did ask you to make another computation, did I not?

THE COURT: Please. I am just asking a simple question, at least it seems to me simple. It may be simple in another sense, too, but I am trying to understand what Dr. Garfield and you are about to do. So if his response is as of May 1, 1977, then fine.

MR. WISEHART: All right.

Q. Can you tell the jury and the court how that computation is, in fact, made?

A. Yes, sir. There are two basic ingredients to such a computation. The first one is an estimate of the length of life lived by the person born December 7, 1921 and the second one is the rate of interest at which to discount the stream of pension payments which would have commenced on May 1, 1977.

Looked at another way, if we may, the number that I have come up with is what an insurance company would require as a single sum on May 1, 1977 in order to provide a pension of $920 a month for life for a man born December 7, 1921.

On this set of assumptions, namely, five percent interest and a mortality table, which is called group annuity table for 1951, as shown in this Exhibit 2 in front of me.

THE COURT: Before we proceed further, so I can know what I am supposed to do with this, assuming I find that Captain Chambless was due to be awarded $920 as of May 1, 1977 to the current time and I ordered that such an award be made, what effect is Dr. Garfield's testimony going to have on that?

MR. WISEHART: That is the second computation that we will offer, your Honor.

THE COURT: What is the purpose of this?

MR. WISEHART: The purpose of this, this is twofold. This, firstly, is an alternative method of calculating damages.

Secondly, this, as compared with another calculation that we will offer, is relevant to the question of whether what happened to Captain Chambless is arbitrary and capricious in economic terms.

THE COURT: Very interesting. You may proceed.

Q. You mentioned two assumptions, Dr. Garfield. The first was the length of life that the individual would be expected to have, I believe. Can you tell the court and the jury whether your assumption is the same as that which is used by the MM&P pension plan?

A. My assumption was the same as the one shown on Exhibit 2.

Q. Tell them what that assumption is based upon?

A. The 1951—this particular mortality table has a designation called group annuity table for 1951. This table was constructed from records of insurance companies which issued group annuity type pension contracts approximately 30 odd years ago.

When insurance companies issue these kind of pension contracts, naturally people die from these pension plans and the insurance companies have the records and as a result they can build up mortality tables from such records.

What they did was they made such a mortality table back in 1951—

THE COURT: I think that the simple answer is going to be that you relied on various mortality tables. I don't think that explanation is going to be necessary.

THE WITNESS: It is a standard mortality table, your Honor.

THE COURT: We utilize them quite often. Insofar as Captain Chambless is concerned, what is the expectation of his lifetime?

THE WITNESS: Let me explain one other thing. I made it a little simpler than it really is, your Honor. Actuaries do not, in fact, use the number expectation of life. We in fact use probabilities of survival.

However, I could say this: That in 1977 Captain Chambless was 56. A man aged 56, based upon the 1951 group annuity table, could expect to live approximately 23 years. So he could have expected to have survived from 56 to his late 70s.

Q. The second assumption that you made I believe was concerning a rate of interest.

A. Yes, sir.

Q. And the rate of interest assumption was based upon the same rate of interest that the actuaries use for the MM&P pension plan, is that right?

A. Yes, sir, that is correct.

Q. For the record, since the jury doesn't have this in front of them, you might as well mention the rate of interest.

A. That rate was 5 percent.

Q. Making those assumptions, you made your computation and what was the I think you used the word "worth" of that pension as of May 1, 1977?

MS. PLEVAN: I. Going to object for the record, your Honor, because I don't think this type of damage claim is appropriate under the law, so I would like to state my objection in that regard.

THE COURT: I think you are right, but you may proceed.

MR. EPSTEIN: I will join in that objection, your Honor.

THE COURT: You may proceed.

A. The number that I arrived at as of May 1, 1977 was $196,122.

Q. Dollars?

A. Dollars.

Q. Is that a figure that I think you said insurance companies would use in selling a pension commitment like that or what was it you said?

A. I used the example of an insurance company to illustrate how the whole procedure works, but, yes, if the insurance company were to use the same assumptions that I have used, namely, the 1951 group annuity table, five percent interest, the single premium, the single sum that would have been required as of May 1, 1977 to provide a pension of $920 a month would have been $196,122.

Q. Dr. Garfield, I asked you to make another computation based upon the present value of a pension of $470 a month as of the time when Captain Chambless would be 65 years old, which would be January 1, 1987 was the date, correct?

A. Yes, sir.

Q. Having a present value as of May 1, 1977, correct?

A. You did ask me to do that computation, yes, sir.

Q. Now, for the purpose of valuing the comparative value of pension commitments or the worth of pensions, is that type of comparison a reliable guide to the comparative worth of the commitment?

MR. EPSTEIN: I object to that.

THE COURT: You have lost me. Read the question back. I don't understand it.

MR. WISEHART: Maybe I could simplify it, your Honor.

THE COURT: All right, I think that is completely – I don't understand where you are. Maybe you had better start over again.

MR. WISEHART: Yes.

Q. Dr. Garfield, for the purpose of determining what the value of one pension is in relation to another pension, is that how one would go about doing it?

THE COURT: I don't understand. What is the purpose of the question? You have asked him to give us the present value as of May 1, 1977 of a pension that is $920. The simple thing to do is ask him to give us the present value at May 1, 1977 of a pension that is going to be $470, I think, in January of 1987.

MR. WISEHART: That is what I asked.

THE COURT: Let him answer that question.

THE WITNESS: The pension of $470 a month commencing at age 65 is what we in our jargon call a deferred annuity. It is an annuity which commences at age 65 and, since the person is not yet 65, the commencement date is deferred for a few years.

THE COURT: I think it would be helpful if you would make your explanation succinct.

THE WITNESS: I will try, your Honor. As of May 1, 1977 the present value of a pension of $470 a month payable to a male born December 7, 1921 where the pension commences on January 1, 1987 is $44,302.

Q. Dr. Garfield, those two figures, $44,302 as compared to $196,122, indicate the relative value of those two pensions, is that correct?

A. Yes, sir.

Q. Dr. Garfield, I have asked you to make a computation of the total payments of $920 per month beginning May 1, 1977 to date with certain other adjustments. Will you describe that computation?

A Yes, sir. The computation that I made was I figured out that as of December 1, 1983 if a payment of $920 a month had been made to this man from May 1, 1977 to December 1, 1983 and he had invested it at long-term treasury bond rates, the amount he would have had in the bank would have been $112,607.

Q. That figure includes a certain further adjustment, does it not?

A. Yes, sir. The pension plan includes an adjustment in the pension amount due to cost of living increases of 3 percent a year.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 4258 (RLC)

ARTHUR CHAMBLESS
and MILDRED H. CHAMBLESS,

Plaintiffs,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Arthur M. Wisehart dated November 8, 1984, the plaintiffs will move this Court in the United States Courthouse, Foley Square, New York, New York, before the Honorable Robert L. Carter, United States District Judge, on November 19, 1984, in Room 518, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order altering, amending and clarifying the judgment entered herein on October 30, 1984, pursuant to Fed.R.Civ.P. 59(e), by specifying (a) the amount that the trustees will be required to pay Arthur Chambless as his pension, and the date by which, or period of time within which, the trustees are required to commence making such payments upon receipt of the application therefor, and (b) the date by which the plaintiffs are to make their application for attorney's fees, and providing such other and futher relief as to this Court may seem just and proper.

Dated: New York, New York
November 8, 1984

Yours, etc.

WISEHART & KOCH

Yours, etc.

WISEHART & KOCH

By: /s/ Arthur M. Wisehart

(A Member of the Firm)
Attorneys for Plaintiffs
25 West 43rd Street
Suite 1114
New York, New York 10036
(212) 730-0044

To: PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for MM&P Pension Plan Defendants
300 Park Avenue
New York, New York 10022
(212) 909-7000

AFFIDAVIT OF DR. RALPH GARFIELD IN SUPPORT OF PLAINTIFFS' RULE 59(e) MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 4258 (RLC)

ARTHUR CHAMBLESS
and MILDRED H. CHAMBLESS,

Plaintiffs,

-against-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

AFFIDAVIT OF RALPH GARFIELD

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RALPH GARFIELD, being duly sworn, deposes and says:

1. I am a consulting actuary and Chairman of the Actuarial Science Division at The College of Insurance located at 101 Murray Street, New York, New York. I also am a consultant on various aspects of employment benefits. My background and experience are more fully reflected in the summary annexed to this affidavit as Exhibit A.

2. As the court will recall, I testified as an expert witness in the trial of this case on behalf of the plaintiffs.

3. I have examined the final judgment entered by this court on October 30, 1984, and particularly paragraph (b) thereof which provides that if Captain Chambless elects to cease working in the

maritime industry, certifies that he has done so and applies for a pension within six months of the date of the Court's judgment, "the trustees will treat the application, for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record. . . ."

4. Based thereon, I have been asked to provide my opinion as to the monthly benefit which the trustees should provide if they treat his pension application for the purpose of calculating his wage-related pension as if it had been made in 1977, thereby granting to Captain Chambless a wage-related pension based upon his 1967-1977 employment record.

5. In my opinion, assuming such benefits are made payable beginning January 1, 1985, they should be in the amount of $2,730 per month for the rest of the life of Captain Chambless (or for five years, whichever is the longer).

6. My calculation is based upon the following:

(a) Pension payments of $920 per month (with 3% cost of living adjustments) that were not made for the period beginning May 1, 1977 through December 31, 1984 would have accumulated to $144,980 as of December 31, 1984, with interest calculated using long-term U.S. Treasury Bond yields.

(b) The lump sum calculated in (a) above has a value that would provide a monthly annuity of $1,600 for life (or for five years, whichever is longer). This calculation is based upon the U.P. 84 Table at ten and a quarter percent. These tables are prepared by the Pension Benefit Guaranty Corporation, a United States government agency.

(c) The amount in (b) above when added to the pension benefit that would now be payable had it started May 1, 1977 ($1,130 per month) produces a total present benefit of $2,730 per month.

(d) The foregoing calculations are made after having reviewed the applicable provisions of the regulations of the Masters, Mates and Pilots Pension Plan.

(e) It is my opinion that monthly payments in the amount of $2,730 beginning at January 1, 1985, are required in order to give effect to the terms of the judgment providing that the trustees are to treat

the pension application of Captain Chambless, for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record (subject to future cost of living adjustments that may be required).

/s/ Ralph Garfield

RALPH GARFIELD

Sworn to before me
this 13th day of November, 1984
[NOTARY SEAL]

AFFIDAVIT OF DR. RALPH GARFIELD: EXHIBIT A

RALPH GARFIELD
Enrolled Actuary (#1219)

HOME: 65 Livingston Lane, Englishtown, N.J. 07726
(201) 780-2365

OFFICE: The College of Insurance, 123 William St.,
N.Y., N.Y. 10038 (212) 962-4111

BORN: September 7, 1935 in London, England

CITIZENSHIP: Naturalized U.S. Citizen (1971)

MARRIED: November 1, 1970 – Two children, 8/22/73
and 5/31/76

EDUCATION: F.I.A. – Fellow of Institute of Actuaries of
England (1953-1960)
B.A. Cum Laude (1964-1967) – New York
University, Majoring in Mathematics
M.A. (1967-1970) – Yeshiva University Belfer
School of Science
Ph.D. (1971-1978) – New York University
Graduate School of Business, Majoring in
statistics and operations research.

WORK EXPERIENCE:

1970 – Present: 1. Chairman, Actuarial Science Division,
The College of Insurance with extensive
administrative as well as teaching duties.

1969 – 1970: 2. Vice-President, David Langer Co. – a New
York Consulting Actuarial Firm.

1961 – 1969: 3. Associate Actuary, Johnson & Higgins –
a large New York Insurance Brokerage
House and Consulting Actuarial Firm.
Responsible for actuarial valuations and
cost studies for corporate and union
pension plans.

1960 – 1961: 4. Actuarial Assistant, Bacon & Woodrow –
A London Consulting Actuarial Firm.

1953–1960: 5. Actuarial Trainee, U.K.P.I.–An English Life Insurance Company.

In addition to duties at The College of Insurance, I do the following:

1. Consulting Actuarial Work in connection with pension plans, large and small.
2. Valuation of pension for marital dissolution and testifying thereon.
3. Calculation of lost earnings in wrongful death actions.
4. Teach seminars for New York Actuaries Club.

PROFESSIONAL SOCIETIES:

Institute of Actuaries of England (F.I.A.)
Society of Actuaries (A.S.A.)
American Academy of Actuaries (M.A.A.A.)
American Society of Pension Actuaries (M.S.P.A.)

HONOR SOCIETIES:

Member of: Phi Beta Kappa, Pi Mu Epsilon and Delta Pi Sigma.

COURSES TAUGHT:

Pension Fund Mathematics
Calculus and Analytical Geometry
Mathematics of Finance
Remedial Mathematics
Numerical Analysis
Calculus I, II, III
Life Contingencies
Special Courses geared to Enrolled Actuary Exam under E.R.I.S.A.
Operations Research
Life Insurance Mathematics
Modern Algebra
Probability and Mathematical Statistics

PUBLICATIONS:

1. Article to the Actuary concerning the valuation of pensions for Marital Dissolution

2. Set of notes and problems for Part I of actuarial exams-General Mathematics
3. Set of notes and problems for Part II of acturial exams–Probability & Statistics
4. "A Problem in Variable Annuities" with solution in A.R.C.H. (Actuarial Research Clearing House)
5. The Multinomial Theorem Revisited–A.R.C.H.
6. Reserves at Fractional Durations using Balducci Hypothesis–A.R.C.H.
7. Differences of Zero–A.R.C.H.
8. Contributions of Discussions in Transactions of Society of Actuaries
9. Solutions to Problems Printed in American Mathematical Monthly, Fibonacci Quarterly, Mathematics Magazine

INTERESTS: Reading, Music, Travel, Long-Distance Running

STATUTORY PROVISIONS RELIED UPON

SHERMAN ANTITRUST ACT, Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court. 26 Stat. 209, as amended, 15 U.S.C. §1.

CLAYTON ACT, Section 4

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15.

LABOR MANAGEMENT RELATIONS ACT, Section 301

Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 61 Stat. 156, 29 U.S.C. §185.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 3(22)

The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan

commencing at normal retirement age. The normal retirement benefit shall be determined without regard to–

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For the purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title. 88 Stat. 833, as amended, 29 U.S.C. §1002.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 3(24)

The term "normal retirement age" means the earlier of–

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of–

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

88 Stat. 833, as amended 29 U.S.C. §1002.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 203

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(3)(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits –

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan; as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

88 Stat. 854, as amended, 29 U.S.C. §1053.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 502(a)

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries: and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

88 Stat. 891, as amended, 29 U.S.C. § 1132.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 405

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees–

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that–

(A) the named fiduciary violated section 1104(a)(1) of this title–

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

88 Stat. 878, 29 U.S.C. §1105.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 502(a)

(a) Persons empowered to bring a civil action

A civil action may be brought–

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

88 Stat. 891, as amended, 29, U.S.C. §1132.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 502(f)

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in the subsection (a) of this section in any action.

88 Stat. 891, as amended 29 U.S.C. §1132.

EMPLOYMENT RETIREMENT INCOME SECURITY ACT, Section 510

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. §301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall

be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

88 Stat. 895, 29 U.S.C. §1140.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 79-190 Civ-T-H

WILLIAM F. DEAK, et al.,

Plaintiffs,

-vs-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

MEMORANDUM OPINION

This is an action instituted by the named Plaintiffs for themselves and others similarly situated,[1] ". . .under the provisions of the Employee Retirement Income Security Act of 1974 ('ERISA') (29 USCA Ch. 18) brought to recover benefits due Plaintiff[s] under the terms of the Masters, Mates and Pilots Pension Plan, to enforce [their] rights under the terms of the plan, to obtain relief for and to redress violations of the provisions of ERISA and the terms of the plan, and to obtain such further relief as is appropriate." (Complaint, paragraph 1).

The case proceeded to trial before the Court without a jury on January 17, 18, 19 and 31, 1983. At the conclusion of the testimony the Court granted the Defendants leave to file a post-trial brief. Due to delays in the preparation of the transcript, that brief was not filed until July 22, 1983. The Plaintiffs filed their response on August 15, 1983. The issues have been fully briefed and the case is now ripe for decision.

The Masters, Mates and Pilots Pension Plan (the Plan) was established many years ago by the International Organization of Masters, Mates and Pilots ancillary to its collective bargaining agreements in the maritime industry with employers of "Licensed Deck Officers,"

---

1 By Order dated February 12, 1981, the case was certified as a class action pursuant to Rule 23(b)(2), F. R. Civ. P.

the designated participants in the Plan.

Each of the named Plaintiffs is, by profession, a Master of ocean going vessels. Each possesses a Master's license issued by the Coast Guard permitting the holder to sail in any capacity as a Deck Officer; and, at all times material to the case, each of them was under sixty-five (65) but had more than twenty (20) years of service in the maritime industry, including more than twenty (20) years of credit with the Plan.

Prior to 1976, the Plan provided for four types of pensions available to Plan participants: a Normal Pension for employees who retired with a sufficient number of years of service; a Reduced Pension for employees who retired after age 65 but with less service than required for a normal pension; an Early Retirement Pension for employees who retired between the ages of 60 and 64 after certain specified years of service; and a Disability Pension. (Article II-A, Section 1 of the Plan).

With respect to eligibility for a Normal Pension, the Plan provided in pertinent part as follows (Article II-A, Section 2):

> "*Section 2. Eligibility for a Normal Pension.* An employee shall be entitled to retire on a Normal Pension if he meets the following requirements:
>
> > "i. He has pension credits for at least 20 years, regardless of age."

The pre-1976 Plan also contained a so-called "Retirement Defined Rule" which provided in pertinent part as follows (Article II-A, Section 13):

> "*Section 13. Retirement Defined*
>
> > "a. To be considered retired, a person must withdraw completely from any further employment in any capacity in the maritime industry [except under certain circumstances with the permission of the Trustees of the Plan].
> >
> > "b. If a Pensioner works in employment forbidden by this section,
> >
> > > "1. He shall not be entitled to pension benefits for any month of such employment and for 6 additional months."

On December 29, 1975, the Trustees of the Plan adopted Amendment No. 42 in apparent anticipation of those provisions of ERISA due to become effective on January 1, 1976 (pursuant to 29 USC §1061(b)(2)).

With respect to those provisions of the Plan relevant to this case, Amendment No. 42 did three things. It added a definition of "Normal Retirement Age"; it changed the terminology in the Plan from "Normal Pension" to "Regular Pension"; and it added a new type of pension (known as a Deferred Vested Pension keyed in part to the new definition of Normal Retirement Age). Specifically, Amendment No. 42 provided in pertinent part as follows:

> "A. New Sections 13 and 14 shall be added to Article I as follows:
>
> > "*Section 13.* 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation.
>
> * * * *
>
> "B. All references in the Rules and Regulations to 'Normal Pension' shall be changed to read 'Regular Pension.'
>
> "C. The last sentence of the first paragraph of Section 1, Article II-A shall read:
>
> > "*Five* different types of pensions are established.
>
> "D. A new paragraph e. is added to Section 1, Article II-A as follows:
>
> > "e. A Deferred Vested Pension for employees who retire after the age of 60 or their Normal Retirement Age with sufficient years of vesting service.

The definition of Normal Retirement Age added to the Plan by Amendment No. 42 corresponded with the ERISA definition of the same term. The Act provides:

> "The term 'normal retirement age' means the earlier of–
>
> "(A) the time a plan participant attains normal retirement age under the plan, or
>
> "(B) the later of–
>
> > "(i) the time a plan participant attains age 65, or
> >
> > "(ii) the 10th anniversary of the time a plan participant commenced participation in the plan."

29 USC §1002(24).

In August, 1976, the Trustees of the Plan adopted another amendment, Amendment No. 46, which revised the "Retirement Defined Rule." Specifically, Amendment No. 46 modified subparagraph b of Section 13, Article II-A of the Plan to read, in pertinent part, as follows:

> "b. If a Pensioner works in employment forbidden by that Section,
>
> > "1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age, as defined in Article I, Section 13; provided further however, that if such employment is in the capacity of a Licensed Deck Officer on a U. S. flag ocean going vessel employed by a company which is not a participant in the M. M. & P. Pension Plan. . .then the Pensioner shall not be entitled to pension benefits for any months prior to such Pensioner reaching his Normal Retirement Age, as defined in Article I, Section 13."

In this instance, the three named Plaintiffs applied in 1977 (Deak and Spence) or 1978 (Fonda) for a Normal (Regular) Pension; and, although each was less than 65 years of age, all three had more than 20 years of credited service and the Trustees of the Plan granted a Normal (Regular) Pension to each of them. Within a short period of time after receiving their pensions, however, each of the named Plaintiffs became employed once again as a master of a vessel; and, upon learning of such employment, the Trustees of the Plan suspended the Plaintiffs' pension payments because of their alleged violations of the "Retirement Defined Rule" as amended by Amendment No. 46. The Plaintiffs then filed this action; and they have previously summarized the heart of their claim as follows:

> "Taken together, Amendments 42 and 46 intertwined 'normal pension,' 'normal retirement age,' and the 'bad-boy/noncompete' clause so that if a pensioner retired after 20-30 years of service, but under age 65, and became reemployed [by a 'competing' employer], that pensioner lost all benefit payments until age 65, even if the pensioner was reemployed for only one day. Pensioner Plaintiffs have challenged these Amendments and their operation as illegal under ERISA."

By Order on Motions for Summary Judgment dated August 18, 1982, in an effort to define the issues and give direction to the course of the litigation, the Court concluded that the case presented the following legal issues:

1. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of Plaintiffs' class, violate the minimum vesting standards of ERISA, 29 USC §1053(a), and particularly §1053(a)(3)(B)(ii)?

2. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of the Plaintiffs' class, violate the minimum vesting standards of ERISA, 29 USC §1053(a), and particularly §1053(a)(3)(B)(ii), with special reference to the distinction made in Amendment No. 46 beween covered and competing employment?

3. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of the Plaintiffs' class, even if otherwise lawful under ERISA, nevertheless violate the Defendants' fiduciary obligations to the Plaintiffs under ERISA, 29 USC §1104(a)(1)(a), by virtue of any alleged improper motivation?

A.

As previously noted, Amendment No. 46 provides that a pensioner working in forbidden employment is not entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period does not extend beyond normal retirement age. The Amendment further states that if the forbidden employment is as a licensed deck officer (LDO) on a United States flag ocean-going vessel operated by a company not participating in the Plan, then the pensioner is not entitled to benefits for *any* month prior to reaching normal retirement age.

The Plaintiffs contend that this Amendment violates Section 203(a) of ERISA, 29 USC §1053(a). Specifically, the Plaintiffs assert that prior to January 1, 1976[2] the Plan provided for a "normal" or unreduced pension upon the completion of twenty (20) years of service regardless of age. Therefore, the Plaintiffs reason, since the term "normal retirement age" was never mentioned in the pre-ERISA plan, normal retirement age under the Plan was the age of a participant upon the completion of twenty years of service. Thus, any provision of the Plan which denies pension benefits to those who retire with twenty years of service (here Amendment No. 46), runs afoul of the minimum vesting standards of the statute.

The Defendants, on the other hand, assert that normal retirement age under the Plan is as defined in Amendment No. 42 and 29 USC §1002(24)(B)—that is, the later of age 65 or the employee's age on the tenth anniversary of his participation in the Plan.[3] Since the possibility of subsequent suspension of benefits pursuant to Amendment No. 46 is limited to benefits payable before normal retirement age, the Defendants contend, Section 203(a) of ERISA is simply not applicable. Thus, the argument continues, the Trustees of the Plan could suspend these participants' benefits before age 65 without violating ERISA.

Section 203(a), 29 USC §1053(a), provides in pertinent part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . .

Section 3(24) of ERISA, 29 USC §1002(24), states:

> The term "normal retirement age" means the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan or

---

2 The vesting provisions of ERISA became applicable to these Plaintiffs on January 1, 1976. 29 USC § 1061(b)(2).

3 The Defendant asserts that, contrary to the Plaintiffs' claims, the definition of normal retirement age in Amendment No. 42 "merely expressly defined that which had been implicit throughout." (Defendant's Post-Trial Brief at 8.) This conclusion is based on the fact that age 65 has long been a component of several types of pensions under the Plan.

(B) the later of–

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

An examination of the plain language of the statute and the provisions of the Plan reveals that the Plaintiffs' contention is without merit. As the Court has previously stated, Amendment No. 42 validly altered certain portions of the Plan in anticipation of the operation of ERISA in January, 1976. Those changes, made before the vesting provisions of the statute became applicable, operated to coordinate the terminology of the Plan with that of ERISA by explicitly defining normal retirement age in a way suggested by the statute, and by changing the name of the pension from "normal" to "regular".[4]

Similarly, Amendment No. 46 plainly provides that a suspension of benefits may occur in certain circumstances, but that such suspension may not extend beyond normal retirement age as defined in the statute. Therefore, since Section 203(a) requires only that pension rights must be vested and nonforfeitable upon the attainment of the statutory normal retirement age,[5] the new "Retirement Defined Rule" of Amendment No. 46 does not violate ERISA's minimum vesting standards. *See Johnson v. Franco*, Case No. 83-3009 (5th Cir. March 19, 1984) slip op.; *Plumlee v. The International Organization of Masters, Mates and Pilots*, Case No. 82-3455 (9th Cir. June 8, 1983) slip op.; *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983), *Hurn v. Retirement Pension Fund*, 648 F.2d 1252 (9th Cir. 1981), *rev'd on other grds*, 703 F.2d 386 (9th Cir. 1983); *Riley v. MEBA*

---

4 These alterations did not, however, in any way amend, modify or repeal the Plan provisions governing the pension available after twenty years of service regardless of age. *See* Order of August 18, 1982.

5 "There is nothing in the legislative history which casts doubt upon such a reading of 203(a). Indeed, other provisions of ERISA recognize that Congress never intended to impose upon a plan a requirement that any benefits be payable before age sixty-five . . . . thus it does no violence to the scheme of the Act to permit defendant to withhold benefits from plaintiff until plaintiff reaches age sixty-five." *Riley v. MEBA Pension Trust*, (*Riley* II) 452 F.Supp. 117, 120 (S.D.N.Y. 1978).

Pension Trust, (*Riley* II), 452 F. Supp. 117 (S.D. N.Y.), *aff'd* 586 F.2d 968 (2d Cir. 1978);[6] *cf. Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan*, Case No. 79-0263 (D.D.C 1979) memorandum op.

B.

Section 203(a)(3)(B) of ERISA, 29 USC §1053(a)(3)(B) provides:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits –
>
> > (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Plaintiffs further contend, and presented evidence to show, that their subsequent employment was not "in the same industry, in the same trade or craft and the same geographic area covered by the Plan"; and, therefore, the Trustees could not properly suspend their benefits under Section 203(a)(3)(B) of ERISA.

Consideration of this contention is foreclosed, however, by the previous conclusion that the minimum vesting standards of the statute do not apply to this case in the first instance because the Plaintiffs simply have not attained the statutory normal retirement age. *See Riley* (*Riley*

---

6 The Plaintiffs attempt to distinguish all of these cases by calling *Plumlee*, *Harm*, *Hurn* and *Riley* II "early retirement cases" which differ from this case in which the Plaintiffs have reached normal retirement age. This argument, of course, simply begs the issue.

II), 452 F. Supp 117 (S.D. N.Y.), *aff'd*, 586 F.2d 968 (2d Cir. 1978).[7] This conclusion is supported by the relevant portion of the Regulations promulgated by the Department of Labor which states:

> This section (Section 203(a)(3)(B)) sets forth the circumstances and conditions under which such benefit payments may be suspended. A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement payable after attainment of normal retirement age, or the actuarial equivalent thereof.

29 CFR §2530.203-3(a).

C.

The Plaintiffs next claim that the Trustees' adoption of Amendment No. 46 violated the fiduciary duty owed by the Trustees to the pensioners. The Plaintiffs specifically contend that the Trustees adopted Amendment No. 46 to protect the Union from loss of membership rather than to solely benefit the Plan participants.

Section 404(a) of ERISA, 29 USC §1104(a) provides:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

---

7 "The arguments in both the district court and here revolved around that question and the issue of whether Riley's government employment as an Assistant Construction Representative was 'in the same industry' and 'in the same trade or craft' as his previous employment by the United States Lines, Inc. ERISA § 203(a)(3)(B)(ii). Neither party paid [illegible] attention to technical provisions of the new statute, notably those as to the effect [illegible]ate, *see* 570 F.2d at 410-13. All things considered, we believe that if counsel for MEBA had moved for modification of the mandate to allow the district court to consider the claim that § 203(a) does not protect Riley against forfeiture until he reaches normal retirement age, we should and would have granted it." *Riley* II, 586 F.2d at 972.

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

Trustees are generally knowledgeable of the details of a trust and are, therefore, in a position to make prudent judgments concerning participant eligibility. Additionally, the trustees bear a responsibility to all potential beneficiaries, and such a duty necessarily results in the drawing of hard boundary lines which inevitably adversely affect some individuals. *See e.g. Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d 537 (9th Cir. 1980); *Rueda v. Seafarers International Union*, 576 F.2d 939 (1st Cir. 1978). Consequently, as the Eleventh Circuit recently stated:

> The actions of the trustees in the administration of the pension plan must be sustained as a matter of law unless plaintiff can prove such activities have been arbitrary or capricious.

Sharron v. Amalgamated Insurance Agency Services, Inc., 704 F.2d 562, 564 (1983). Although there appears to be no established standard for identifying the characteristics of an arbitrary or capricious decision by pension plan trustees, case law does provide some guidance. Thus, federal courts have invalidated the adoption of forfeiture provisions where the trustees' actions were not based upon actuarial needs, but rather on the trustees' own assumptions and surmises (*See Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978)). Similar results have been reached where the forfeiture provisions were

"unduly drastic given the poor fit between the provisions and the goal they [were] designed to achieve," and "far less punitive means [were] available to satisfy the legitimate objectives of fund preservation" (*See Central Tool Company v. International Association of Machinists National Pension Fund*, 523 F. Supp. 812 (D. D.C. 1981)).

A careful analysis of the provision in question and the evidence presented at trial leads me to the conclusion that the Trustees in this instance breached their statutory fiduciary duty in adopting Amendment No. 46. In short, the Trustees drew a distinction between certain types of re-employment in the industry primarily to protect the Masters, Mates and Pilots Union (the Union) by discouraging members who were eligible for their pension from accepting any job which benefitted a competing union.

At trial and throughout their brief, the Defendants attempted to portray Amendment No. 46 as a rational and even necessary measure designed to protect the financial integrity of the Plan from the adverse consequences of certain developments in the maritime industry and the weakening financial status of some contributing employers. Specifically, the Defendants contend that the maritime industry was in a state of flux, owing primarily to the increased use of larger, more expensive and more technologically advanced ships which employed fewer but more highly qualified mates and deck officers. (T-B-138-9, T-B-149-53). Because the employment of other than MMP personnel on these ships would result in a loss of contributions to the Plan, Amendment No. 46 was adopted to encourage new owners and employers to seek MMP personnel. (T-B-155). The Amendment would supposedly attract the new employers to MMP members by discouraging the most experienced pensioners from seeking employment with non-contributing employers through the mechanism of a harsher penalty for employment with non-contributory employers than for employment with contributing ones.

While these justifications may appear reasonable at first glance, they do not withstand the careful scrutiny with which they must be analyzed.[8] The Defendants' after-the-fact explanations offered at trial

---

8 "We are not to close our eyes as judges to what we must perceive as men." *People ex rel Alpha Portland Cement Company v. Knapp*, 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920) (Cardozo, J.)

concerning their motivations for the adoption of Amendment No. 46 simply do not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage.

Contrary to the Defendants' assertions concerning the actuarial need for a measure like Amendment No. 46, both the Plan Administrator and a Union Trustee testified that although the Plan had some, unfunded liability, it was adequately funded and actuarially sound at the time the Amendment was considered. (T-B-11506, T-C-85, T-C-133). There was, in fact, no reference whatsoever in the minutes of the meetings during which the Amendment was considered to any actuarial studies or projections upon which Amendment No. 46 could have been based. (*See* Plaintiffs' Exhibit No. 10). Indeed, while the Plan's actuarial consultants were actively advising the Trustees concerning the financial impact of ERISA and were aiding in the preparation of several other changes in the Plan provisions (*See* Defendants' Exhibit No. 27), they gave no advice concerning the necessity of imposing the harsh and differing penalties for the protection of the Plan's financial integrity. (T-D-38).

It is also significant that despite the availability of less drastic provisions by which to accomplish the Trustees' avowed intention of inducing new ship owners to become contributors to the Plan (T-C-143-5),[9] there was little discussion among the Trustees concerning any alternatives to the provision. It is equally significant that at the time of the adoption of the Amendment the Union was involved in an ongoing struggle for members with other maritime labor organizations (*E.g.*, T-B-141), and that the text of Amendment No. 46 was originally drafted by Union counsel (T-C-142).

All of this strongly evidences that the Trustees were primarily motivated by a desire to protect the Union through the passage of the

---

9 There can be little doubt that the Trustees could have fashioned a less restrictive suspension mechanism which would have accomplished their stated objective of attracting the new owners of the larger, more technologically advanced ships to become contributors to the Plan. For instance, a suspension provision which keyed a limited suspension to employment on vessels exceeding a certain size or less than a certain age would protect the financial integrity of the Plan in the face of anticipated developments in the maritime industry while at the same time providing a *non-punitive* measure with regard to suspension of participants' benefits.

Amendment (*see also* T-C-145) and were not acting "for the exclusive purpose of providing benefits to participants and their beneficiaries."

RELIEF

Having concluded that the Trustees breached their statutory fiduciary duty in adopting Amendment No. 46, Section 502(a)(3) of ERISA, 29 USC § 1132(a)(3) authorizes the Court to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or. . .to [grant] other appropriate equitable relief to redress such violations or to enforce any provisions of this subchapter or the terms of the plan."[10]

In determining what is appropriate relief in this case, I must consider the remedy which is logically dictated for each distinct sub-class previously certified.[11] The three subclasses are: (1) all persons who are members of the Masters, Mates and Pilots Pension Plan presently receiving benefits who are under the age of 65; (2) all persons who are members of the Masters, Mates and Pilots Pension Plan who have had their benefits suspended as a result of their seeking employment after payment of benefits has commenced; (3) all members of the Masters, Mates and Pilots Pension Plan who have qualified for "Normal" or "Regular" retirement, are under 65 years of age, and have not retired. As to sub-classes (1) and (3), injunctive relief alone provides an appropriate remedy since members of those classes have not experienced any monetary detriment as a result of the adoption and administration of Amendment No. 46. Consequently, as to these sub-classes, the Trustees will be enjoined from enforcing the provisions of Amendment No. 46 to the extent that such amendment purports to justify suspension of plan benefits, due to employment in the maritime industry, for any month occurring more than six (6) months following the cessation of such employment.

---

10 "The reports of the various committees. . .make it clear that Congress intended to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of fiduciary duty." *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

11 By order dated February 12, 1981, three sub-classes were certified pursuant to Rule 23, F. R. Civ. P.

The members of sub-class (2), however, have suffered financially as a result of the enforcement of Amendment No. 46. Therefore, the members of sub-class (2) are entitled to have their improperly suspended benefits restored; this means that the Plan must immediately pay to each member of sub-class (2) any benefits previously suspended pursuant to Amendment No. 46 and owing at the present date, together with prejudment interest from the date of each suspension at the rate of 12%,[12] provided further that such benefits would also be owed the Plan participants under the terms of the Retirement Defined Rule[13] which Amendment No. 46 was designed to replace.[14] Further, the Trustees will be enjoined from enforcing the provisions of Amendment No. 46 against the members of sub-class (2) in the future.

The conclusion that the Trustees have breached their fiduciary duty, however, neither requires nor implies a finding that the Trustees acted with any willful intent to breach their statutory obligation to the Plan beneficiaries, and I now explicitly decline to make such a finding. Rather, the Trustees' adoption of Amendment No. 46 merely manifests an innocuous divided loyalty which happened to produce a result which, in law, constitutes a violation of fiduciary obligations. Therefore, I cannot say that the Trustees' actions in this case were so "malicious, flagrant or outrageous," as to justify the imposition of punitive damages. *See e.g. Baeten v. Van Ess*, 474 F. Supp 1324, 1331 (E.D. Wis. 1979). As outlined above, there are adequate means of enforcing the Plaintiffs' rights short of imposing punitive damages.

---

12 The Court may consider by analogy the law of the forum state as the proper basis for establishing the rate of prejudgment interest. *Sabine Towing and Transportation Company, Inc. v. Zapata Ugland Drilling, Inc.*, 553 F.2d 489 (5th Cir. 1977). *See Fla. Stat.* § 687.01.

13 Article II-A, Section 13 of the pre-1976 Plan.

14 Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty. Specifically, that body of law provides that in such instances plan participants should be restored to the position they would have occupied but for the breach of trust; that is, a return to the *status quo ante*. Restatement (Second) of Trusts, § 205, Comment as *cited in Eaves v. Penn, supra*, at 462. In this instance, a return to the *status quo ante* means that determination of the benefits due the members of sub-class (2) must be calculated as they would have been if the pre-Amendment No. 46 Retirement Defined Rule were in effect throughout the period during which benefits were suspended.

Similarly, I decline to find the individual Trustees personally liable to these Plaintiffs for the economic consequences flowing from the breach of fiduciary duty which occurred here. This case is not one involving a loss of plan assets, or profits to the fiduciary through the use of plan assets, and is, therefore, not the type of breach for which Congress intended to impose personal liability. *See* 29 USC § 1132(d)(2); 29 USC § 1109; 1974 U.S. Code Cong. & Ad. News 5038, 5100. Imposing the burden of personal liability upon the individual Trustees for such a violation of a very complex statute might deter capable persons from serving as trustees for these plans. *See Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982).

A separate order granting the relief outlined herein will be entered accordingly.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 4th day of June, 1984.

/s/

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 79-190 Civ-T-H

WILLIAM F. DEAK, et al.,

Plaintiffs,

-vs-

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Defendants.

FINAL DECREE

Pursuant to the Court's Memorandum Opinion filed this date it is now

ORDERED, ADJUDGED AND DECREED:

1. That Amendment No. 46 to the Masters, Mates and Pilots Pension Plan (the Plan) is hereby declared to be void and without any force to the extent that such amendment purports to justify the suspension of plan benefits, due to employment in the maritime industry, for any month occurring more than six (6) months following the cessation of such employment;

2. That the Defendants and their agents, employees, attorneys and those persons in active concert and participation with them who receive actual notice of this Decree by personal service or otherwise are hereby permanently restrained and enjoined from enforcing Amendment No. 46 (to the extent described in paragraph 1 above) in order to withhold or suspend benefits from the following classes or sub-classes of Plan participants:

(1) All persons who are members of the Masters, Mates and Pilots Pension Plan presently receiving benefits who are under the age of 65;

(2) All persons who are members of the Masters, Mates and Pilots Pension Plan whose benefits were suspended by the operation of the invalid portion of Amendment No. 46 as a result of their seeking employment after payment of benefits had commenced;

(3) All persons who are members of the Masters, Mates and Pilots Pension Plan who have qualified for "Normal" or "Regular" retirement, are under 65 years of age and have not retired.

3. That, in order that the members of Sub-class (2) may have their improperly suspended benefits restored, the Defendants are directed to file with the Court, within ninety (90) days of the date of this Order, an accounting stating:

(a) The names of all persons within Sub-class (2);

(b) The months during which their benefits were both suspended pursuant to Amendment No. 46 and owed under the terms of the Retirement-Defined Rule which Amendment No. 46 was designed to replace, viz., Article II-A, Section 13 of the pre-1976 Plan;

(c) The amounts now due and owing to each named member of Sub-class (2) under the terms of this Decree and the Court's Memorandum Opinion.

4. That the Court retains jurisdiction of the parties and of this cause for the purpose of enforcing this Order and making such further Orders as are necessary.

DONE and ORDERED at Tampa, Florida, this 4th day of June, 1984.

/s/

UNITED STATES DISTRICT JUDGE

EXCERPTS FROM PLAINTIFFS' RESPONSES TO INTERROGATORIES, MARCH 22, 1982, RELATING TO ANTITRUST DAMAGES

Interrogatory No. 7

State the amount of earnings allegedly lost by Arthur Chambless equivalent to the differential in earned income between a Master and junior officer for which he seeks recovery in this action; state the period during which such earnings were allegedly lost; and describe in detail the manner in which such lost earnings were calulated.

Response to Interrogatory No. 7

The amount of earnings lost by Arthur Chambless equivalent to the differential in earned income between a Master and junior officer for which he seeks recovery in this action equals $43,470. The period during which such earnings were lost occurred between February 14, 1976, and April 4, 1977. The aforementioned differential in lost earnings was calulated on the basis of the difference resultant from subtracting his earned income for the year 1976, when Arthur Chambless was employed as a junior officer, from his income earned for the year 1977, when Arthur Chambless was employed for a three month period as third mate and thereafter for the balance of the year as Master, with an adjustment made for the three-month differential when he was employed as a third mate, and a further adjustment made to reflect the vacation pay earned between November 2, 1977, and December 31, 1977, but received in 1978.

* * * *

Interrogatory No. 9

State the amount of damages allegedly suffered by Captain Chambless as a result of the antitrust violations alleged in the complaint and describe in detail the manner in which such damages were calculated.

Response to Interrogatory No. 9

The amount of damages suffered by Captain Chambless as a result of the antitrust violations committed by the defendants herein was in the amount of $580,410. Said damages were calculated on the basis

that the deprivation of his earned pension as of age 55, with earned pension credits totalling 32¼ years and appropriate consideration being made for survivorship benefits and cost of living increases plus the loss resultant from the reduced benefit anticipated when and if said payment commenced upon his reaching age 65 totals $150,000 plus his loss of differential earnings in the amount of $43,470, times 3, as the appropriate recovery for antitrust violations.

PX-13: PORTION OF *THE MASTER, MATE & PILOT*, NOVEMBER, 1961

END AGE RULE ON VESTED PENSIONS

NEW YORK – MM&P has scored a major breakthrough for its membership in vastly liberalizing its prime pension rule.

MM&P members with at least 15 years accrued credit time may now withdraw both from the industry and MM&P without any penalty or loss of their accrued pension credits; a vested guarantee of payment.

The significance of the MM&P improvement is in marked contrast to other sea unions which require continue dues-paying union membership despite the fact that the pensioner no longer earns his livelihood at sea.

Thus, at the member's option, he may withdraw from MM&P with no penalty for failing to "stay in good standing" and withdraw from his profession with guaranteed pension payments, based on his seatime and without regard to age.

The giant leap forward is expected to revitalize both the merchant marine and MM&P in not too many years. In announcing the decision Nov. 1 of the trustees of the MM&P Pension Plan, Pres. Charles M. Crooks observed:

"A TWO-FOLD purpose would be accomplished with this new gain. The industry would become more attractive to younger deck Officers who would thereby add to the nation's readiness, and there would be a more equitable distribution of the available berths as they become available through this 'voluntary attrition' process."

"Vesting," in effect, removes the "break rule" pension stipulation after a member has accrued at least 15 years of covered employment and guarantees payment of a monthly amount equal to $7.50 for each year of pension credit, regardless of age.

And even broader expansion of this rule is contemplated by MM&P Pension Plan trustees before the present Agreements expire in 1984.

It is well known that a substantial number of members who have not reached age 65, but who have at least the [illegible] years seatime in [sic] qualify for a pension have been "hanging on" doing port relief work to eventually qualify.

"THIS WORKS an unpardonable hardship on those members who are more than entitled to their pension on the sole basis of 15 years minimum service and not determined by their age," Capt. Crooks declared.

EXCERPTS FROM TRIAL TESTIMONY OF ROBERT J. LOWEN, PRESIDENT OF THE UNION

MS. PLEVAN [Counsel for the Pension Plan]: Let me do it this way.

Q. Captain, did you participate in discussions that led up to the adoption of Amendments 46 and 47?

A. Yes.

Q. Based on those discussions, would you describe to the court what were the reasons for the adoption of those amendments?

A. Yes.

[colloquy deleted.]

* * * *

Q. Do you have the question in mind?

A. Yes. It is not going to be a simple yes or no answer, your Honor. May I expound?

THE COURT: That is what she is asking you.

A. Yes, the trustees were looking at two things. One was a very rapid depletion of the base upon which the plan received moneys and the second was the knowledge by the trustees, both management and union, that there was a whole new ballgame coming down the ways with very large ships, a whole new technology and an entirely different situation in the ownership of these ships.

* * * *

That is what we were doing. We knew that there were going to be big ships coming down, Captain Chambless testified about one, the ship called the Williamsberg. The Williamsberg was 200 thousand ton ship. It replaced 20 ships such as he was on on the Hess ships, 20 of them. Instead of 20 times 5 licensed deck officers, 100 people, the contributions are coming in on, on the ship he was master on there were four in exchange for a hundred.

* * * *

So that what we did is we tried to develop a series of amendments that did two things. They said, okay, for all practical purposes we were the industry men, and I am talking about we were the licensed deck officers in this industry.

There were two engineering unions. They had primarily engineers, but the deck officer union was almost a monopoly and I say that in the labor sense of the word, a labor monopoly, and we looked at insuring that whatever we did in the plan, we wanted to make it unattractive for anyone to go anywhere's else and we wanted to be sure that whatever we did because of ERISA was legal and toward that end I believe Mr. Epstein was asked to develop two amendments with full agreement of employer counsel and employer trustees.

Those two amendments were to in effect, one, pick up the two parts of the pie. One, pensions and the other of participants.

* * * *

Those two amendments were to insure that, one, we kept—we as the plan and our part of the industry kept available to us the officers that any new company out there needed to operate a ship.

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

—against—

MASTERS, MATES & PILOTS PENSION PLAN, et al.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BETTINA B. PLEVAN
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000
Counsel for Respondents
M.M.&P. Pension Plan,
Maher and M.M.&P.
Pension Plan Trustees

Of Counsel

JOSEPH BAUMGARTEN

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Chambless' Failure to Retire Within the Meaning of the Plan Regulations	2
Proceedings Below	4
REASONS FOR DENYING THE WRIT	6
I. Review By This Court Of The Relief Granted After Trial Is Unwarranted	6
II. The Court Of Appeals Did Not Decide That ERISA Implicitly Repealed Antitrust Remedies	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	PAGE
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	8
Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983)	12
Bayles v. *Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97 (5th Cir. 1979)	7
Blue Shield of Virginia v. *McCready*, 457 U.S. 465 (1982)	11
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	10, 11
Cator v. Herrgott & Wilson, Inc., 609 F. Supp. 12 (N.D. Cal. 1984)	8
Corley v. *Hecht Co.*, 530 F. Supp. 1155 (D.D.C. 1982)	10
Deak v. *M.M.&P. Pension Plan*, No. 79-190 slip op. (M.D. Fla. June 4, 1984)	8
Delgrosso v. *Spang and Co.*, 769 F.2d 928 (3d Cir. 1985)	9, 10
Fine v. *Semet*, 699 F.2d 1091 (11th Cir. 1983)	8
Geib v. *New York State Teamsters Conference Pension and Retirement Fund*, 758 F.2d 973 (3rd Cir. 1985)	7, 8
Harm v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983)	7, 8
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944)	9
Janowski v. *International Brotherhood of Teamsters Local 710 Pension Fund*, 673 F.2d 931 (7th Cir.), *cert. denied*, 459 U.S. 858 (1982), *vacated on other grds.*, 464 U.S. 1222 (1983)	8

PAGE

Johnson v. *Franco*, 727 F.2d 442 (5th Cir. 1984)..... 8

McBarron v. *S&T Industries, Inc.*, 771 F.2d 94 (6th Cir. 1985)..... 8

Riley v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977)..... 7

Sutton v. *Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 2387 (1984) 8

Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) ... 9

Statutes

§ 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5)..... 1

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq..... 5, 6, 8

§ 203(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1053(a)..... 5, 6, 7, 8

§ 510 of ERISA, 29 U.S.C. § 1140 ..... 5, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-930

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

—against—

MASTERS, MATES & PILOTS PENSION PLAN, et al.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents M.M.&P. Pension Plan, Maher and M.M.&P. Pension Plan Trustees oppose the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on August 28, 1985.

STATEMENT OF THE CASE

The M.M.&P. Pension Plan (the "Plan") is a multi-employer plan established to provide pension benefits to licensed deck officers who retire from sailing in the American Merchant Marine. It is jointly administered by an equal number of employer-designated and union-designated Trustees, as required by § 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), and in accordance with regulations adopted by the Trustees of the Plan (the "Plan Regula-

tions"). The funds used to provide benefits under the Plan are contributed solely by the participating employers. (Pet. App. A-3-A-4)[1]

Petitioner Arthur Chambless ("Chambless") sailed as a member of the International Organization of Masters, Mates & Pilots (the "IOMM&P" or "Union") from 1944 until 1977, as, at various times, a third mate, second mate, chief mate and master. In November 1976, Chambless applied for pension benefits, but shortly thereafter withdrew his application and continued employment aboard vessels covered by collective bargaining agreements with the IOMM&P ("IOMM&P-contracted vessels"). (Pet. App. A-6)

Chambless submitted a second application for pension benefits in early April 1977. Upon receipt of each of Chambless' applications, the Plan sent him a letter of acknowledgment notifying him of the Plan's requirement that he "retire" within the meaning of the Plan's definition of "retirement" and advising him to direct any questions concerning his retirement to the Plan Administrator. (*Id.*)

Chambless' Failure to Retire Within the Meaning of the Plan Regulations

In order to receive pension benefits, a participant must "retire" within the meaning of the Plan Regulations. When Chambless applied for pension benefits in April 1977, Article II-A, Section 15(a) of the Plan Regulations provided, in relevant part, that "[t]o be considered retired, a person must withdraw completely from any further employment, in any capacity, aboard any vessel whatsoever." (Pet. App. A-4)

The Plan has always required participants to "retire," to ensure that pension benefits are paid only to participants who

---

1 References to pages in petitioner's appendix are designated as "Pet. App. ____." References to pages in the petition are designated as "Pet. ____." References to pages in the trial transcript are designated as "R. ____." References to plaintiffs' and defendants' trial exhibits are designated as "PX____" and "DX____," respectively.

have chosen to give up the sea as a career. The Plan is not intended to provide unemployment benefits or a second source of income for participants who continue to work aboard vessels. (R. 778, 796) Although the definition of retirement has been amended from time to time, it has always prohibited employment aboard vessels. (R. 936)

Participants in the Plan, over the years, have been kept informed of the Plan's retirement-defined provisions. For example, the Plan distributed booklets to participants in 1968 setting forth the definition of retirement. Moreover, participants who apply for pension benefits (including Chambless) are given specific notice of the definition of retirement in the Plan's acknowledgment of receipt of their application. (Pet. App. A-21; R. 922; PX-52; PX-57; DX-VV; DX-WW)

During the processing of Chambless' 1977 application, the Plan received information that he was working aboard a vessel and, therefore, had not retired within the meaning of the Plan Regulations. The Plan also learned that the vessel upon which Chambless had been working was operated by a company not contributing to the Plan. In response to the Plan's inquiry, Chambless confirmed this information. Thereafter, by letter dated January 26, 1978, Chambless was advised that: (1) the Trustees had denied his application for pension benefits because he had not retired within the meaning of the Plan Regulations; and (2) in accordance with Amendment 47 to the Plan Regulations, the payment of any benefits would be deferred until he reached "normal retirement age," defined by Article I, Section 13 of the Plan as age 65. (Pet. App. A-6–A-7)

Amendment 47, adopted in August 1976, provides that, if a participant works as a licensed deck officer on a U.S. flag ocean-going vessel operated by a company not contributing to the Plan, his benefits will not commence until normal retirement age. It reads, in pertinent part:

> In the event a Participant, subsequent to his accrual of credit for 10 years of vesting service and prior to his

> retirement, is employed in the capacity of a Licensed Deck officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P/PMA Pension Plan . . . , such Participant shall not be entitled to any pension benefits prior to his reaching his Normal Retirement Age, as defined in Article I, Section 13.

(Pet. App. A-5)

The Plan Regulations also provide that a pensioner is entitled to receive the higher of a flat-rate pension benefit, or a wage-related benefit based on the average of the pensioner's highest five years of "pay" (defined as salary earned in covered employment) during the ten years immediately preceding the effective date of his pension. Had Chambless actually retired in 1977, his wage-related benefit would have been $920 per month. Under Amendment 47, however, the effective date of Chambless' pension was postponed until he reached age 65. Assuming he did not engage in covered employment during that time, he would not have sufficient "pay" during the last ten years preceding the effective date of his pension to qualify for a wage-related benefit. The Plan therefore notified Chambless in 1980 that, upon retiring at age 65, he would receive the flat-rate benefit of $470 per month. (Pet. App. A-4, A-7)

Proceedings Below

Captain and Mrs. Chambless brought this action against the IOMM&P, the Plan, the Plan Trustees, the Plan Administrator, several former employers and two multi-employer bargaining associations. Plaintiffs alleged violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), as well as of federal labor and antitrust laws. They sought restitution of allegedly forfeited pension benefits, a clarification of pension rights and treble damages, as well as damages for emotional distress and punitive damages. (Pet. App. A-7–A-9) Plaintiffs did not, however, assert claims, now raised in their petition for a writ of certiorari, under either the

Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., or § 510 of ERISA, 29 U.S.C. § 1140.

The District Court granted in part defendants' motion for summary judgment, dismissing the claims that: (1) defendants violated the antitrust laws; (2) the deferral of Chambless' pension benefits violated § 203(a) of ERISA, 29 U.S.C. § 1053(a); (3) the Plan's 1975 adoption of age 65 as normal retirement age was a sham; (4) the Plan was estopped from deferring Chambless' benefits; (5) Chambless' pension application failed to receive adequate review; and (6) the Plan improperly withheld information from Chambless. All claims against the employers and the multiemployer bargaining associations were also dismissed. (Pet. App. A-9)

Summary judgment was denied as to the claim that Amendment 47 to the Plan Regulations was arbitrary and discriminatory. Summary judgment was also denied on Chambless' claim that the Plan failed to give him adequate notice of Amendment 47. (*Id.*)

In its decision after trial, the District Court found that the Plan had failed to advise Chambless fully of the effect that Amendment 47 would have on the calculation of his "wage-related" benefit upon retirement at normal retirement age, and that Amendment 47 was arbitrary and capricious as applied to Chambless because it caused a reduction of his monthly benefit from $920 to $470. The District Court also concluded that Amendment 47 had been enacted primarily to protect the IOMM&P, rather than the Plan, and was therefore arbitrary and capricious "in any event." (Pet. App. B-9) The deferral of Chambless' benefits until age 65 was declared a nullity and the Trustees were ordered to approve his application for a pension and to calculate the amount of his monthly pension benefit as if he had applied in 1977, provided he ceased working in the maritime industry and applied for a pension within six months of the date of judgment. (Pet. App. A-10–A-11; B-14–B-15)

Judgment was entered on October 30, 1984. (Pet. App. B-14–B-15) Plaintiffs' motion to modify the judgment was denied by endorsement order dated November 30, 1984. (Pet. App. C-1–C-2) Thereafter, the Plan defendants appealed from the October 30, 1984 judgment. Plaintiffs cross-appealed from the summary judgment decision, as well as the judgment after trial. On appeal, plaintiffs again failed to raise any claim under the ADEA or § 510 of ERISA.

In a decision dated August 28, 1985, the Court of Appeals affirmed the decision of the District Court in all respects. The court held, *inter alia*, that: (1) Amendment 47 does not violate § 203(a) of ERISA (Pet. App. A-16–A-17); (2) Chambless was not entitled to pension benefits retroactive to 1977 because he had never retired within the meaning of the Plan's definition of retirement (Pet. App. A-20–A-21); and (3) the District Court had not erred in dismissing Chambless' antitrust claim. (Pet. App. A-19–A-20) The Court of Appeals also held that it was reasonable for the District Court to give Chambless six more months from the date of its decision to retire in order to be eligible to receive the monthly benefit to which he would have been entitled had he retired in 1977. (Pet. App. A-21)

REASONS FOR DENYING THE WRIT

I. Review By This Court Of The Relief Granted After Trial Is Unwarranted

The bulk of the petition is devoted to an attack on the nature of the relief granted by the District Court after trial and upheld by the Court of Appeals. Because the relief granted is consistent with the resolution of the legal issues and raises no important questions under ERISA, review by this Court is unwarranted.

Chambless appears to argue that it was inconsistent for the courts below to find Amendment 47 unlawful but to refuse to award him pension benefits retroactive to 1977. That claim was

properly rejected below because, regardless of the effect of Amendment 47 on his right to receive benefits, Chambless has never "retired" within the meaning of the Plan Regulations. Rather, as the Court of Appeals noted, "Chambless has worked continuously in the maritime industry since May 1, 1977, and has not 'withdraw[n] completely from any . . . employment . . . aboard any vessel whatsoever,' " as would be required by Article II-A, Section 15(a), the Plan's definition of retirement. (Pet. App. A-20) Because the retirement-defined provision was properly upheld, Chambless is not entitled to retroactive benefits.

Contrary to Chambless' contention, the denial of retroactive benefits did not "effectively repudiat[e]" the decision that Amendment 47 is unlawful. (Pet. at 7) As the courts below recognized, the requirement that a participant "retire" in order to receive benefits is separate and distinct from Amendment 47. Because Chambless never alleged or proved that he had complied with the retirement-defined rule by withdrawing from work aboard a vessel, there is nothing anomalous about the fact that he was denied retroactive benefits.

Moreover, Chambless did not even challenge the Plan's retirement-defined rule as arbitrary. Even if such a contention were made, however, it would have had to be rejected, since rules for suspending benefits of individuals who are not retired have repeatedly been upheld as reasonable. *See, e.g., Geib* v. *New York State Teamsters Conference Pension and Retirement Fund*, 758 F.2d 973 (3d Cir. 1985); *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983); *Bayles* v. *Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97 (5th Cir. 1979); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977).

Chambless also contends that the deferral of his benefits constituted an unlawful "forfeiture" under § 203(a) of ERISA because he reached "normal retirement age" under the Plan before 1977. That argument was rejected by both the Court of Appeals and the District Court on the grounds that: (1) the

minimum vesting rules of § 203(a) do not require the payment of any benefits to a participant until he attains "normal retirement age"; and (2) the Plan's designation of age 65 as normal retirement age was valid. The courts below thus concluded that because Chambless had not reached age 65, the deferral of his benefits did not violate § 203(a).

This conclusion is consistent with the decisions of every other circuit that has considered the scope of § 203(a). *See McBarron* v. *S&T Industries, Inc.*, 771 F.2d 94 (6th Cir. 1985); *Geib* v. *Teamsters Fund, supra*, 758 F.2d 973; *Johnson* v. *Franco*, 727 F.2d 442 (5th Cir. 1984); *Harm* v. *Bay Area Pipe Trades Pension Plan, supra*, 701 F.2d 1301; *Janowski* v. *International Brotherhood of Teamsters Local 710 Pension Fund*, 673 F.2d 931 (7th Cir.), *cert. denied*, 459 U.S. 858 (1982), *vacated on other grds.*, 464 U.S. 1222 (1983); *Fine* v. *Semet*, 699 F.2d 1091 (11th Cir. 1983); *Sutton* v. *Weirton Steel Division of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S. Ct. 2387 (1984). *See, also, Cator* v. *Herrgott & Wilson, Inc.*, 609 F. Supp. 12, 18 (N.D. Cal. 1984) (citing the District Court decision in this case); *Deak* v. *M.M.&P. Pension Plan*, No. 79-190, slip op. (M.D. Fla. June 4, 1984). Chambless' claim for retroactive benefits was thus correctly rejected on the basis of well-established ERISA principles and presents no question deserving review by this Court.

Nor is any important question raised by Chambless' request that the Court review the proviso in the District Court's judgment conditioning his future eligibility for certain benefits upon his retiring and filing for benefits within six months of the date of the court's decision. Contrary to his assertion that the relief ordered runs afoul of the ADEA, the remedy in no way involves a "forced retirement scheme." (Pet. at 15) In any event, neither the ADEA claim, nor Chambless' retaliation claim under § 510 of ERISA, was raised below and, therefore, should not be considered as a basis for granting certiorari. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Chambless' real complaint is that inclusion of the six-month proviso was an abuse of the District Court's discretion. This argument, however, not only fails to raise any substantial question of federal law, but ignores the rationale for the six-month proviso. As the Court of Appeals explained, even if Amendment 47 is a nullity, both the Plan's definition of retirement and its provision for wage-related benefits remain intact. Under those provisions, the amount of a participant's wage-related benefit (assuming he is entitled to one) is normally calculated on the basis of his salary in covered employment during the ten-year period immediately before the effective date of his pension; if a participant does not retire, but works in non-covered employment during that period, not only is his "retirement" date postponed, but the amount of his wage-related benefit is reduced as well. (Pet. App. A-21)

The District Court decision, however, required the Plan to calculate Chambless' future benefits as if he had retired in 1977, "i.e., based upon his last years of higher paying covered employment, and not upon the ten year period immediately prior to his retirement." (*Id.*) Such relief, standing alone, would have accorded Chambless an unfair advantage over other participants by allowing him to continue to work indefinitely aboard vessels in uncovered employment, without any impact on his wage-related benefit. For this reason, the Court of Appeals concluded, it was reasonable for the District Court to condition this advantage on Chambless' retiring within six months of the date of its decision.

This Court has repeatedly held that federal courts have broad discretion to fashion appropriate equitable remedies. " 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.' " *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), *citing Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Such discretion extends to the formulation of remedies under ERISA. *See, e.g., Delgrosso* v. *Spang and Co.*,

769 F.2d 928, 937 (3d Cir. 1985); *Corley* v. *Hecht Co.*, 530 F. Supp. 1155, 1164 (D.D.C. 1982). Where, as here, the District Court exercised its discretion in a reasonable manner, the relief ordered was affirmed by the Court of Appeals, and no important legal question is presented, review by this Court is unwarranted.

II. The Court Of Appeals Did Not Decide That ERISA Implicitly Repealed Antitrust Remedies

In seeking to obtain review of the dismissal of his antitrust claim, Chambless misconstrues the decisions below. Contrary to his suggestion, those decisions in no way suggest that ERISA "was intended to repeal by implication available antitrust remedies." (Pet. at 11) Rather, the District Court concluded, and the Court of Appeals agreed, that Chambless simply had not suffered antitrust injury within the meaning of this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Because neither of the decisions below was grounded on the "eliminat[ion of] antitrust remedies" (Pet. at 10), that question is not presented for the Court's consideration.

Nor does the Court of Appeals' decision raise any other question under federal law warranting this Court's review. Because of the complicated and unique circumstances of this case, a decision by the Court on the merits of Chambless' purported antitrust claim would not serve as a useful precedent in future cases.

The decisions below are, in any event, correct. In *Brunswick Corp.*, *supra*, the Court held that even where there has been a violation of the antitrust laws, an award of treble damages is proper only for an "antitrust injury":

> We . . . hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say

> injury of the type the antitrust laws were intended to prevent and that *flows from that which makes defendants' acts unlawful.*

429 U.S. at 489 (latter emphasis added).

Chambless' antitrust claim is apparently based on his allegation that the deferral of his pension benefits until normal retirement age created "a hindrance and interference with the ability of licensed deck officers to market their skill[s]." (Pet. App. A-19) As the Court of Appeals held, however, "[t]o the extent that Chambless' antitrust claim is based on a limiting of employment opportunities, he can claim no direct injury in light of his successful continued employment on non-MM&P vessels." (*Id.*)

Nor is Chambless' loss of pension benefits an injury that "flows from that which makes defendants' acts unlawful." *Brunswick*, *supra*, 429 U.S. at 489. The conduct alleged to violate the antitrust laws is the Plan's adoption of Amendment 47. As discussed above, however, the reason for Chambless' loss of pension benefits is not Amendment 47, but the fact that he did not qualify under the Plan's valid definition of retirement. Because that definition applies equally to covered and non-covered employment in the maritime industry, it raises no question under the antitrust laws. As the Court of Appeals recognized, the legality of the deferral of Chambless' benefits is "essentially an ERISA matter." (Pet. App. A-20)

The decision in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), is inapposite. That case involved an entirely different factual context, in which the numerous ERISA questions confronting the courts below in this case were not present. The *Blue Shield* decision simply has no bearing on whether a pension plan participant in Chambless' position can recover treble damages under the antitrust laws.

Unlike the case presented in *Blue Shield*, moreover, Chambless' theory of damages is "speculative, abstract [and] impractical." *Id.* at 475 n.11. Not only does Chambless' claim—that

he would have retired but for Amendment 47—fail to raise any legal question for the Court to decide, but, given the fact that he twice returned to maritime employment after applying for retirement benefits (before he claims even to have known of Amendment 47), there is simply no way to determine when and whether Chambless would ever have retired and, therefore, no way to do any more than speculate as to the amount of pension benefits (if any) that he would have lost "by reason of" Amendment 47. *See Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 543 (1983).

In dismissing Chambless' antitrust claim, the District Court noted:

> In his efforts to find a legal theory about which relief for his client's grievance could be granted, Chambless' counsel adopted the blunderbuss or fishing expedition approach—putting every colorable theory into his complaint. "[P]laintiff has attempted to assert an antitrust claim when [his] true grievance is grounded in" ERISA and duty of fair representation law.

(Pet. App. D-35, citation omitted) That observation is equally applicable to Chambless' petition for certiorari. Under such circumstances, review of the antitrust question claimed to be presented should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 24, 1985

Respectfully submitted,

BETTINA B. PLEVAN
Counsel for Respondents
M.M.&P. Pension Plan, Maher and
M.M.&P. Pension Plan Trustees

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Of Counsel:
JOSEPH BAUMGARTEN

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-930

In the

Supreme Court of the United States

October Term, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

- against -

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street
New York, New York 10036
(212) 730-0044

Attorney for Petitioners

Of Counsel:
John W. Whittlesey

PRINTINGHOUSE PRESS – (212) 719-3129

TABLE OF CONTENTS

	PAGE
Argument	1
Conclusion	5

No. 85-930

In the

Supreme Court of the United States

October Term, 1985

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

Petitioners Arthur Chambless and Mildred H. Chambless respectfully submit this brief in reply to the respondents' brief in opposition to their petition for the grant of a writ of certiorari.

ARGUMENT

The pension plan respondents incorrectly contend that the petitioners "did not even challenge the Plan's retirement-defined rule as arbitrary." (p. 7).

On the contrary, however, the petitioners' pre-trial memorandum dated October 21, 1983, specifically states (p. 15):

"The action of the trustees is arbitrary and capricious in the manner in which the Pension Plan is administered. The plaintiffs will present evidence to show (a) that the Pension Plan has no regular system for investigating compliance with the prohibitions on certain types of other employment, and (b) that the application of said provisions is arbitrary and capricious in any event because they are mutually inconsistent and have been in a constant state of change."

The contention was reiterated in petitioners' proposed post-trial findings to the District Court as follows (p. 23):

"The 'retirement defined' regulations are discriminatory in themselves in that they permit certain types of maritime employment while penalizing others.

References:

"Plaintiffs' Exhibits 40 and 8 (pp. 128–129a);
Defendants' Exhibit III (Article II-A §17)."

At page 8, the brief of the pension plan respondents contends, also incorrectly, that "neither the ADEA claim, nor Chambless' retaliation claim under §510 of ERISA, was raised below. . . ."

On the contrary, the complaint herein specifically refers to the nondiscrimination provisions in §510 of ERISA (29 U.S.C. §1140), and alleges that the action of the defendants (¶28):

"(d) Is punitive in purpose and effect, discriminating against more experienced licensed deck officers including plaintiff who serve on non-M.M. & P. vessels because they reject harassment by the M.M. & P., or the alternative of assignment to a substandard position or forced retirement from their profession, and violates 29 U.S.C. §1140, [*i.e.*, §510] because it was adopted to discriminate against such participants and for the purpose of interfering with the attainment of rights to which they and their beneficiaries are entitled."

Further, petitioners' brief to the Court of Appeals refers to age discrimination as a part of a pattern of intentionally discriminatory conduct (pp. 46–47).

In addition, the petitioners' Post-Trial Proposed Findings of Fact dated December 16, 1983, specifically state (pp. 41-43):

"The Amendments and the underlying motivation are in conflict with the strong public policy that prohibits discrimination against older employees.

References:

"United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 575 (1982), stresses the importance of public policy factors in evaluating the reasonableness of pension plan provisions;

"Trial Tr., Chambless, pp. 702-3, 708 (Walter Anderson, the MM&P Port Agent in the hiring hall in Mobile, Alabama, sought to induce Captain Chambless to retire by saying that he would only be permitted to sail as Second or Third Mate in the future, and that the Union wanted him out 'because they wanted to replace the older men with new blood';

"Trial Tr., Lowen, pp. 225-230 (Similarly, the President of the MM&P, Lowen, confirmed that action had been taken over a period of years to retire older employees in the interest of getting 'new blood in the Union'. In his testimony, when this was brought to his attention, Lowen did nothing to repudiate or otherwise explain the policy that had thus been expressed by him);

"The continuing bias against the older members is shown by statements by the MM&P President indicating a desire to cull out the older members in favor of the younger members on the pretext that the latter are 'more readily adaptable to retraining';

"See also Plaintiffs' Exhibit 15, p. 2;

"Plaintiffs' Exhibit 20;

"The discriminatory motivation for the Amendments is not disputed. What is admitted to have been intended as a 'harsher penalty' (Pension Plan Pre-Trial Memorandum, p. 10), was designed to prevent older members of the workforce from continuing to engage in productive employment in their chosen field, and was adopted as part of a program designed to favor younger employees and bring 'new young blood' into the Union. Such a discriminatory

motivation in connection with pension benefits is improper and will not constitute adequate justification for action taken by a pension plan. See *EEOC* v. *Home Insurance Company*, 672 F.2d 252, 262 (2d Cir. 1982), rejecting each of the five purported justifications for lowering a mandatory retirement age for being in conflict with the Age Discrimination in Employment Act."

Finally, the petitioners' brief to the Court of Appeals states (p. 31):

"In forcing a 'Hobson's choice' upon Captain Chambless and the older licensed deck officers, coupled with a 'harsher penalty' if they took other employment, the defendants behaved in a strikingly non-fiduciary manner, in their quest for 'new young blood' (and higher income from initiation fees – estimated to run nearly a half a million dollars a year). Captain Chambless therefore should recover as compensatory damages the economic consequences to him, as well as any benefit that the defendants have retained."

Respondents here rest virtually their entire opposition argument on the claim that punitive action against Captain Chambless was justified because he failed to comply with respondents' retirement rules. But that is a major issue in this case, whether respondents can, in compliance with the antitrust laws, erect a barrier to petitioner's engaging in lawful competitive employment by the denial or impairment of his vested pension benefits if he does so. The anti-competitive motive of respondents is not in dispute. In their Cross-Petition here in Docket No. 1097, respondents candidly admit that their purpose was to discourage "[pension plan] participants from making their services available to non-contributing employers." (p. 5)

It is submitted that such a motive, admitted by respondents, violates well-settled law as previously enunciated by this Court. *UMW* v. *Pennington*, 381 U.S. 657 (1965); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982).

Indeed, Judge Carter, in his decision herein below, states that:

"The Union cannot adopt a policy of forcing applicants to retire or face low-paying assignments *or penalize them from working apart from MM&P*. . ." (B-10; emphasis added.)

See *Duchow* v. *IBT Retirement Fund*, 691 F.2d 1978 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983), which establishes that ERISA should not be interpreted so as to vitiate pre-ERISA rights.

CONCLUSION

The contentions of the pension plan respondents should be rejected as without merit. The gross abuse of fiduciary standards of conduct as exemplified by the findings in the instant case should lead to the granting of a writ of certiorari to Captain Arthur Chambless and Mrs. Mildred Chambless to review the issues raised by their petition herein.

Respectfully submitted,

Arthur M. Wisehart
WISEHART & KOCH
25 West 43rd Street
New York, New York 10036
(212) 730-0044

Attorney for Petitioners

Of Counsel:
John W. Whittlesey